

B 2
STORAGE



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114680077>

A20N
R
054

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

July 1992



ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	M.G. MITCHNICK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	J.B. BLOCH
	L. DAVIE
	N.V. DISSANAYAKE
	O.V. GRAY
	B. HERLICH
	R.J. HERMAN
	R.D. HOWE
	J. JOHNSTON
	B. KELLER
	P. KNÖPF
	S. LIANG
	J. McCORMACK
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	W.S. O'NEILL
B.L. ARMSTRONG	D.A. PATTERSON
C.A. BALLENTINE	H. PEACOCK
W.A. CORRELL	R.W. PIRRIE
K.S. DAVIES	F.B. REAUME
A.R. FOUCAULT	J. REDSHAW
W.N. FRASER	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.R. MONTAGUE	N.A. WILSON
J.W. MURRAY	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1992] OLRB REP. JULY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	A & G Metro Roofing Ltd.; Re Simone Iaquina; Re Ontario Sheet Metal Workers' and Roofers Conference, S.M.W. and S.M.W. Local 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562	769
2.	Camaro Enterprises Limited; Re IUOE, Local 793; Re Group of Employees	772
3.	Canadian Communications Structures Inc.; Re Ironworkers District Council	777
4.	Chimo Inns, The Douglas Macdonald Development Corporation c.o.b.; Re Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351; Re Group of Employees	786
5.	Crete Flooring Group Limited; Re L.I.U.N.A., Local 506; Re O.P.C.M., Local 598	792
6.	Gorf Contracting Ltd.; Re I.B.E.W., Local Union 1687	800
7.	Hostess Frito Lay Co., The; Re Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Re Group of Employees .	809
8.	Municipality of Metropolitan Toronto; Re Carpenters and Allied Workers, Local 27, C.J.A.	817
9.	Bruce Reilly; Re the U.S.W.A.; Re GSW Inc.	820
10.	Shalom Village South, Saint Elizabeth Home Society, Ontario Ministry of Health and Hamilton Jewish Home for the Aged Charitable Foundation Operating as; Re S.E.I.U., Local 532	827
11.	Simcoe County Association for the Physically Disabled; Re C.U.O.E.	857
12.	Steinberg Inc. (Miracle Food Mart Division) and The Great Atlantic and Pacific Company of Canada Limited; Re Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Re R.W.S.D.U., AFL CIO CLC, and its Local 414	860
13.	Union Felt Products (Ontario) Ltd., Almac Products Inc. and Almac Industries Inc.; Re The Canadian Textile and Chemical Union; Re U.S.W.A., Upholstering & Allied Industries Division (U.D.)	871
14.	Whitler Industries Limited; Re Wade Dennis Proctor	875

COURT PROCEEDINGS

1.	Ellis-Don Limited; Re The OLRB and I.B.E.W., Local 894	885
2.	I.B.E.W., Local 586 and the OLRB; Re I.B.E.W., Local 594, Patrick Wyse and Maurice Walsh	889

SUBJECT INDEX

- Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents
- ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 885
- Accreditation - Abandonment - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents
- ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 885
- Adjournment - Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status
- MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. 817
- Adjournment - Practice and Procedure - Sale of a Business - Stay - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complain-

ant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 860

Bargaining Rights - Abandonment - Accreditation - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 885

Bargaining Unit - Certification - Union seeking bargaining unit of company's drivers in the 2 Sudbury districts of its Northern Ontario region - Company submitting that only appropriate unit would include all its drivers in the Northern Ontario Region - Although union's proposed unit unusual, problems raised by company not so serious as to create an obstacle to an otherwise appropriate bargaining unit - Board finding evidence insufficient to endorse unprecedented Northern regional basis advanced by company as only appropriate bargaining unit - Board finding union's proposed unit appropriate - Certificate issuing

HOSTESS FRITO LAY CO., THE; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES 809

Bargaining Unit - Certification - Union seeking bargaining unit of full-time employees - Employer taking position that full-time and part-time employees should be in the same unit - Board observing that since *Hospital for Sick Children* case, Board focusing on applicant's bargaining unit, in the absence of serious labour relations problems to the employer - Board finding full-time bargaining unit appropriate

SIMCOE COUNTY ASSOCIATION FOR THE PHYSICALLY DISABLED; RE C.U.O.E. 857

Certification - Bargaining Unit - Union seeking bargaining unit of company's drivers in the 2 Sudbury districts of its Northern Ontario region - Company submitting that only appropriate unit would include all its drivers in the Northern Ontario Region - Although union's proposed unit unusual, problems raised by company not so serious as to create an obstacle to an otherwise appropriate bargaining unit - Board finding evidence insufficient to endorse

unprecedented Northern regional basis advanced by company as only appropriate bargaining unit - Board finding union's proposed unit appropriate - Certificate issuing

HOSTESS FRITO LAY CO., THE; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES.....

809

Certification - Bargaining Unit - Union seeking bargaining unit of full-time employees - Employer taking position that full-time and part-time employees should be in the same unit - Board observing that since *Hospital for Sick Children* case, Board focusing on applicant's bargaining unit, in the absence of serious labour relations problems to the employer - Board finding full-time bargaining unit appropriate

SIMCOE COUNTY ASSOCIATION FOR THE PHYSICALLY DISABLED; RE C.U.O.E.

857

Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687

800

Certification - Charges - Evidence - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES.....

772

Certification - Constitutional Law - Construction Industry - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations

CANADIAN COMMUNICATIONS STRUCTURES INC.; RE IRONWORKERS DISTRICT COUNCIL

777

Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598.....

792

Certification Where Act Contravened - Certification - Construction Industry - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing

certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
Certification - Pre-Hearing Vote - Union making certification application on April 7 and, after reviewing employees lists, withdrawing application on May 6 - Union making subsequent pre-hearing certification applications for full-time and part-time employees on May 12 - After meeting with Labour Relations Officer and reviewing employee lists, union seeking to withdraw applications - Employer requesting that applications be dismissed, that six month bar on further applications be imposed, and that union's membership position in the applications be disclosed to employer - Board dismissing certification applications, but declining to impose bar or release union's membership count	
CHIMO INNS, THE DOUGLAS MACDONALD DEVELOPMENT CORPORATION C.O.B.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES	786
Charges - Certification - Evidence - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed	
CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES	772
Charter of Rights - Constitutional Law - Construction Industry - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal	
I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH	889
Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents	
ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894	885

Constitutional Law - Certification - Construction Industry - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations	
CANADIAN COMMUNICATIONS STRUCTURES INC.; RE IRONWORKERS DISTRICT COUNCIL	777
Constitutional Law - Construction Industry - Charter of Rights - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal	
I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH	889
Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents	
ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894	885
Construction Industry - Adjournment - Construction Industry Grievance - Parties - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status	
MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.....	817
Construction Industry - Certification - Certification Where Act Contravened - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
Construction Industry - Certification - Constitutional Law - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding	

that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations

CANADIAN COMMUNICATIONS STRUCTURES INC.; RE IRONWORKERS DISTRICT COUNCIL

777

Construction Industry - Constitutional Law - Charter of Rights - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal

I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH

889

Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562.....

769

Construction Industry - Certification - Pre-Hearing Vote - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598

792

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894

885

Construction Industry Grievance - Adjournment - Construction Industry - Parties - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status	
MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.....	817
Crown Transfer - Ministry of Health revoking licence and taking control of 184 bed nursing home - Ministry operating home for over 3 years - Parties agreeing that home becoming Crown undertaking - Ministry inviting proposals for the 184 beds and subsequently awarding the 184 beds to 3 licensees, including "SV" - "SV" committing itself to receiving a number of residents of nursing home and to considering nursing home staff for employment - Board finding and declaring a transfer of part of an undertaking to "SV" within meaning of <i>Crown Transfers Act</i> - Board remaining seized with respect to other relief	
SHALOM VILLAGE SOUTH, SAINT ELIZABETH HOME SOCIETY, ONTARIO MINISTRY OF HEALTH AND HAMILTON JEWISH HOME FOR THE AGED CHARITABLE FOUNDATION OPERATING AS; RE S.E.I.U., LOCAL 532	827
Damages - Discharge - Health and Safety - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay	
WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR.....	875
Discharge - Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Dependent Contractor - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
Discharge - Damages - Health and Safety - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay	
WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR.....	875
Discharge - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration	
BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC.....	820
Dependent Contractor - Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Discharge - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certi-	

VIII

<p>fication application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing</p>	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
<p>Duty of Fair Representation - Discharge - Remedies - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration</p>	
BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC.....	820
<p>Employee - Certification - Certification Where Act Contravened - Construction Industry - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing</p>	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
<p>Employer - Certification - Certification Where Act Contravened - Construction Industry - Employee - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing</p>	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
<p>Employer Support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents</p>	
ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894	885
<p>Evidence - Certification - Charges - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in</p>	

cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES 772

Health and Safety - Damages - Discharge - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay

WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR 875

Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 885

Judicial Review - Constitutional Law - Construction Industry - Charter of Rights - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal

I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH 889

Membership Evidence - Certification - Charges - Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES 792

Natural Justice - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support

rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894

885

Natural Justice - Construction Industry - Practice and Procedure - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562.....

769

Parties - Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status

MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.....

817

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Parties - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status

MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.....

817

Practice and Procedure - Adjournment - Sale of a Business - Stay - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complain-

ant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 860

Practice and Procedure - Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 792

Practice and Procedure - Construction Industry - Natural Justice - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application -Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562..... 769

Pre-Hearing Vote - Certification - Construction Industry - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 792

Pre-Hearing Vote - Certification - Union making certification application on April 7 and, after reviewing employees lists, withdrawing application on May 6 - Union making subsequent pre-hearing certification applications for full-time and part-time employees on May 12 - After meeting with Labour Relations Officer and reviewing employee lists, union seeking to withdraw applications - Employer requesting that applications be dismissed, that six month bar on further applications be imposed, and that union's membership position in the applications be disclosed to employer - Board dismissing certification applications, but declining to impose bar or release union's membership count

CHIMO INNS, THE DOUGLAS MACDONALD DEVELOPMENT CORPORATION C.O.B.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES..... 786

Remedies - Damages - Discharge - Health and Safety - Complainant claiming damages for mental

XII

distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay	
WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR	875
Remedies - Discharge - Duty of Fair Representation - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration	
BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC.....	820
Reconsideration - Construction Industry - Natural Justice - Practice and Procedure - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the <i>Act</i> - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied	
A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562.....	769
Representation Vote - Certification - Construction Industry - Pre-Hearing Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date	
CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598	792
Sale of a Business - Adjournment - Practice and Procedure - Stay - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the <i>Companies' Creditors Arrangement Act</i> (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent	
STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414	860
Sale of a Business - "UF" purchasing "A" and subsequently transferring certain machinery, production and employees from UF's location to A's location - Employees of UF and A represented by different unions - UF planning total integration of two companies at location of	

A, but plans put on hold - Board finding intermingling and ordering representation vote to determine which of two trade unions should continue to hold bargaining rights

UNION FELT PRODUCTS (ONTARIO) LTD., ALMAC PRODUCTS INC., AND ALMAC INDUSTRIES INC.; RE THE CANADIAN TEXTILE AND CHEMICAL UNION; RE U.S.W.A., UPHOLSTERING & ALLIED INDUSTRIES DIVISION (U.D.) 871

Stay - Adjournment - Practice and Procedure - Sale of a Business - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 860

Termination - Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562..... 769

Unfair Labour Practice - Adjournment - Practice and Procedure - Sale of a Business - Stay - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 860

Unfair Labour Practice - Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Dependent Contractor - Discharge - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general con-

XIV

tractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing	
GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687	800
Unfair Labour Practice - Discharge - Duty of Fair Representation - Remedies - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration	
BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC.....	820
Union Successor Status - Constitutional Law - Construction Industry - Charter of Rights - Judicial Review - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal	
I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH	889
Witness - Certification - Charges - Evidence - Membership Evidence - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed	
CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES	772

0304-92-R Simone Iaquina, Applicant v. Ontario Sheet Metal Workers' and Roofers Conference, Sheet Metal Workers' International Association and Sheet Metal Workers' International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562, Respondents v. **A & G Metro Roofing Ltd.**, Intervener

Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the Act - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application -Reconsideration request denied

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

DECISION OF THE BOARD; July 30, 1992

1. This is an application brought by Simone Iaquina for a declaration terminating the bargaining rights of the respondent unions with respect to the employees of A & G Metro Roofing Ltd.
2. This application (the "Iaquina" application) was filed on April 22, 1992, and in accordance with its usual practice, the Board assigned it an application date (April 22, 1992), and a terminal date (May 7th, 1992). The Board also set a hearing date, May 28, 1992, and Notice of Hearing was forwarded to all parties.
3. On May 19, 1992, the Board received a Reply filed by the respondents Ontario Sheet Metal Workers' Conference and the Sheet Metal Workers' International Association, Local Union 235. The respondents asserted that the instant application was not the first termination application for the bargaining unit in question. The respondents noted that there was already a proceeding before the Board, Board File No. 4146-91-R (the "Koutsoumbelas" application) in which a different applicant had brought an identical application. The terminal date of the Koutsoumbelas application was April 7, 1992. The instant application was therefore filed after the terminal date of the earlier application. The applications are related in that in both, an employee has filed an application seeking a declaration terminating the bargaining rights with respect to the same bargaining units, the same employer, and the same union respondents. The bargaining rights at issue are therefore the same in both proceedings. The respondents accordingly requested that the instant application be delayed until the issues in the prior application had been determined.
4. Pursuant to section 105(3) of the Act, the Board has a discretion as to the manner in which it treats subsequent applications affecting employees covered by earlier applications. That section reads as follows:

105.-(3) Despite sections 5 and [58], where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

5. If the subsequent application is filed on or before the terminal date fixed for the original application, the Board usually takes the approach described in subsection 105(3)(a), assigning the subsequent application the application date of the earlier application, together with the terminal date of the earlier application. See, in this respect, *Koehring Canada*, [1986] OLRB Rep. Nov. 1530; *Kirouac Contracting Ltd.*, [1987] OLRB Rep. Oct. 1262. When the subsequent application is filed after the terminal date of the earlier application however, the Board will assign to the subsequent application its own application date, reflecting the date on which it was filed, its own terminal date, and will apply the approach set out in section 105(3)(b), postponing consideration of the subsequent application until a final decision in the original application has been made.

6. These decisions are made at the time the subsequent application is filed, since the Board must process the application upon receipt. The first step in processing an application is to assign it an application date and a terminal date. There is no realistic option of convening a hearing or inviting the submissions of the parties, with respect to which option under section 105(3) will be applied, prior to making the initial assessment as to the manner in which the subsequent application will be processed.

7. Since the instant application appeared to affect some or all of the same employees as the earlier application, and since it was filed after the terminal date of the first application, the Board would not have set a hearing date had it followed its customary practice. That date was inadvertently set. Given this, when the Board discovered that a prior application had been filed, the Board advised the parties that the hearing of May 28, 1992 was cancelled, and directed the parties' attention to the provisions of section 105(3) of the Act.

8. Shortly thereafter, counsel for the applicant wrote to the Board, requesting reconsideration of the Board's decision that the application be adjourned or deferred, pending resolution of the earlier application. The applicant included extensive submissions in the reconsideration request. The request for reconsideration and supporting submissions were circulated to the other parties, for their comments, indicating that their submissions would be placed before a panel of the Board for its decision. The Board received submissions from the union and the employer, and further submissions from the applicant in response.

9. Turning to the grounds for the request, the applicant first argues that the union's Reply, and request for adjournment of the instant proceeding, ought not to be considered by the Board since it was filed beyond the terminal date of the application, contrary to Rule 17 of the Board's Rules of Procedure. The applicant has not asserted that it suffered any prejudice from this late filing of the Reply, and it is not apparent to the Board that there is any prejudice in the late filing. In any event, whether the Reply was filed in a timely fashion, the fact remains that the instant application does appear to be a subsequent application filed after the terminal date of the earlier application. It does appear as if the Board in error set a hearing date. Had no Reply been filed, but this matter brought to the attention of the Board, the Board would still have cancelled the hearing of May 28th.

10. The applicant next asserts that the adjournment ought not to have been granted

because it was not on consent of all the parties. Again, the decision to cancel the hearing was made because of the provisions of section 105(3) of the Act, and the fact that the instant application fell within the parameters of that section. The hearing was not cancelled merely because the respondent unions requested an adjournment.

11. The applicant submits that the Board breached the rules of natural justice by making its decision in this respect without affording the parties an opportunity to make submissions on how the Board ought to have exercised its discretion pursuant to section 105(3) of the Act. We agree with the applicant that he, and all the parties, are entitled to full and fair opportunity in any proceeding to be heard. We do not agree however, that such a requirement demands that the Board list for hearing the question of how the Board ought to treat a subsequently filed application. As discussed, when an application is received by the Board, it must assign an application date and a terminal date to the application. Once that assessment has been made, and the parties so advised, they should be given full opportunity to challenge the Board's decision. That is precisely what has occurred here.

12. Pursuant to section 104(13) of the Act, the Board is master of its own practice and procedure, provided it gives full opportunity to the parties to any proceeding to present their evidence and make their submissions. Whether an oral hearing is necessary in all circumstances is a matter that is within the Board's discretion, consistent with the requirements of natural justice and section 104(13). In a variety of contexts, the Board has adopted procedures designed to deal with matters more expeditiously, and without the need for full hearings. For example, parties meet with Board Officers on representation matters prior to the scheduled hearing day, in attempts to narrow the issues or settle the matter, often rendering a hearing unnecessary. Even when an issue remains in dispute, there may be no need for an oral hearing.

13. Here, the parties have had full opportunity through their written submissions. The applicant filed submissions in support of its reconsideration request (as Practice Note 17 directs). Those submissions were forwarded to the other parties, and the parties were all advised that their submissions would be placed before the Board for its decision. Unless the written submissions raise evidentiary disputes that need resolution or present sufficient other reason to hold a hearing, the Board sees no reason to set the matter down for oral hearing, with all the attendant delay and cost of such a hearing. Accordingly, we will dispose of the matter on the basis of the written submissions.

14. There is nothing raised by the applicant which would lead us to exercise our discretion differently. The applicant asserts that the instant application gives rise to different issues than in the Koutsoumbelas application. While it may be true that not all the issues in the instant application are issues in the earlier application, there is no question that the two applications each deal with the identical bargaining unit, for the same employer, with respect to the bargaining rights held by the same respondent unions. The issue in each is the same, whether the bargaining rights of the respondent unions, for these bargaining units, ought to be terminated.

15. We are not here deciding that the instant application will not be heard, only that it will be deferred pending a decision in the application that was earlier filed. In our view, the first application ought to be completed before the parties and the Board embark on an potentially duplicative second hearing. We are therefore satisfied that we ought to exercise our discretion pursuant to section 105(3) of the Act to postpone consideration of the instant application until a final decision has been issued in the prior application.

16. The request for reconsideration is therefore denied.

1499-90-R; 1500-90-R; 1512-90-R International Union of Operating Engineers, Local 793, Applicant v. **Camaro Enterprises Limited**, Respondent v. Group of Employees, Objectors

Certification - Charges - Evidence - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. Lear* and *J. Kurchak*.

APPEARANCES: *S.B.D. Wahl*, *E. Kaplanis* and *J. Slaughter* for the applicant; *William S. Gardner* and *Barry Mulder* for the respondent; *Len Miller* for the objectors.

DECISION OF THE BOARD; July 21, 1992

1. These are three applications for certification which were consolidated by the Board by a decision dated April 30, 1992. There are a number of issues in dispute between the parties which are the subject of ongoing hearings before another panel of the Board. This panel convened a hearing into an allegation that Carolyne Baron did not pay at least one dollar at the time she applied for membership in the applicant. The respondent asserts that Edward Kaplanis, an organizer for the applicant, supplied the dollar that was paid with respect to Ms. Baron's application.

2. At the hearing of this matter, the Board heard the evidence of Carolyne Baron, an employee of the respondent at the time of these events, Edward Kaplanis, an organizer and business representative for the applicant, and Len Miller, another employee of the respondent and a representative of a group of employees opposing the applications for certification. Subsequently, the parties filed lengthy written submissions in lieu of oral argument. On July 2, 1992 the Board issued the following decision:

After carefully considering the evidence before us and the parties' submissions, we have determined the non-pay allegation with respect to Carolyne Baron must be dismissed. Our reasons will follow.

These are the reasons for that decision.

3. Carolyne Baron told the Board that she attended a union meeting on August 1st, 1991 in Mr. Kaplanis' room at the Best Western Motel in Dryden, Ontario with the intention of joining the applicant. She testified that Mr. Kaplanis was seated at a desk in the room, and that employees walked over to the desk, one by one, to apply for membership. When Ms. Baron went up to the desk, Mr. Kaplanis took down certain information from her on an application for membership, including her name, address, birth date, employer, classification, social insurance number, phone number, and so forth. Ms. Baron signed the application and Mr. Kaplanis signed in the location designated for a witness. There is a receipt portion attached to the application which indicates that one dollar was received from Ms. Baron by Mr. Kaplanis. Both signed that as well. At some point in this process, according to Ms. Baron, she gave Mr. Kaplanis one dollar of her own money. She testified that Mr. Kaplanis did not pay the dollar for her.

4. Mr. Kaplanis' evidence essentially corroborates that of Ms. Baron in all material

respects. He told the Board that he has been a provincial organizer for seven years, and that in that time he has been involved in fifty or sixty union organizing campaigns. He testified that he did not provide Ms. Baron with the dollar, that it had been “pounded into his brain” to perform the card signing process properly, and that he was a professional who would not do anything so foolish as the respondent asserted. More specifically, Mr. Kaplanis testified that Ms. Baron was one of a number of employees who were concerned about signing membership cards on the respondent’s premises, and who attended at his hotel room on August 1, 1991. He testified that he asked Ms. Baron for the information required on the application for membership, and filled out the application and receipt accordingly. According to Mr. Kaplanis, Ms. Baron signed the form and gave him a dollar. Mr. Kaplanis identified his own signatures on both the application and receipt portion, and he testified that he did not provide the dollar for Ms. Baron.

5. The respondent’s original allegation stipulated that Len Miller had witnessed Mr. Kaplanis paying one dollar for Ms. Baron’s application. However, when Mr. Miller gave evidence, he indicated that he was not present when Ms. Baron joined the applicant and had no first hand knowledge about it at all. He did, however, have a conversation with Ms. Baron in the early fall of 1990 while he was circulating a petition in opposition to the applicant. He testified that in that conversation, Ms. Baron told him that she had joined the union but had not paid one dollar, and that Mr. Kaplanis had paid the one dollar for her. This was the sum total of his knowledge with respect to this matter.

6. Ms. Baron could not recollect making this statement to Mr. Miller. However, she did agree in cross-examination that she had said to counsel for the respondent in a telephone call in May of 1992 that she was not sure about paying the dollar, and that she did not think she had. She also acknowledged that more recently she had said to two other individuals that she could not remember anything about the dollar payment on the receipt portion of the application, that she did not honestly believe that she had paid the money, and that she could not remember paying the amount of money because the event had happened close to two years ago. When confronted with these statements in cross-examination, Ms. Baron told the Board in essence that since the time of these conversations, she had attempted to remember the signing of her card with more clarity and was successful in recalling the facts to which she testified before us.

7. Mr. Kaplanis also gave evidence with respect to certain inquiries made by Jack Slaught-ter, the Form 80 declarant in this matter. The parties further agreed on the admission of several exhibits into evidence with respect to those inquiries.

8. On the basis of these facts, the respondent asserts that we should find that Ms. Baron did not pay at least one dollar with respect to her application for membership. Among other things, he argues that Ms. Baron’s testimony before the Board was not credible, that Mr. Kaplanis’ evidence was unreliable and that the Board should accept Ms. Baron’s prior inconsistent statements as evidence as to the truth of what occurred. Counsel for the applicant argues, among other things, that a reading of sections 105(2)(a) and 105(2)(c) together indicate that the Board is not permitted to accept Ms. Baron’s prior inconsistent statements as evidence of the truth of their contents, that the testimony of both Ms. Baron and Mr. Kaplanis was credible, and that the membership application itself is a contemporaneous documentary record upon which the Board can rely.

9. The obligation that an applicant for membership in a trade union must pay at least one dollar arises from section 1(1) of the *Labour Relations Act*. That section defines “member” in this context as including a person who has applied for membership in a trade union and has paid an amount of at least one dollar to the union on his or her own behalf in respect of initiation fees or monthly dues. While the Board has observed that this payment is now symbolic, and has said that

it will not generally scrutinize casual gifts or loans in this regard between rank and file employees, that lack of scrutiny does not necessarily extend to loans or gifts from union officials (*Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735). Thus the allegation that Mr. Kaplanis paid the dollar for Ms. Baron raises an issue with respect to the membership evidence.

10. Turning to the testimony at the hearing in this regard, we share a number of the respondent's reservations about Ms. Baron's evidence. There is no doubt that the prior inconsistent statements which she acknowledges having made cast significant doubt on the reliability of her testimony. However, even if we reject her evidence in its entirety, we are left only with Mr. Kaplanis' testimony to the effect that Ms. Baron did pay one dollar, and Mr. Miller's evidence about another previous inconsistent statement. In other words, there is no direct affirmative evidence that Ms. Baron did not pay one dollar. Mr. Miller has no first hand information about the payment, and while Ms. Baron acknowledges making previous inconsistent statements, she now testifies under oath that those previous statements were untrue. It is for this reason that the respondent urges us to use Ms. Baron's previous inconsistent statements as evidence of the truth of their contents, and not just to impeach her credibility.

11. We observe at this point that we do not accept counsel for the applicant's view that we *cannot* rely on evidence of this nature because it would not be admissible in a court of record. Sections 105(2)(a) and 105(2)(c) read as follows:

(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

- (c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.

12. Counsel argues that the Board summoned and thereby compelled Ms. Baron to give evidence pursuant to section 105(2)(a). Reading these sections together, he asserts that the Board may admit evidence that may not be admissible in a court of law, but it may not rely upon evidence of witnesses that it summonsed if the evidence given is not admissible "in the same manner as a court of record in civil cases". In other words, he argues that we can *hear* such evidence and our proceedings will not be vitiated by so doing, but that we cannot rely upon it, at least with respect to a summoned witness.

13. In our view, this is not a cogent approach to sections 105(2)(a) and 105(2)(c). It is more logical to interpret the phrase "in the same manner as a court of record in civil cases" as referring to the power to summon and enforce the attendance of witnesses and the other enumerated powers in the subsection. In other words, the Board can "summon and enforce the attendance of witnesses ... in the same manner as a court of record in civil cases". Section 105(2)(c) then deals with the nature of oral and written evidence the Board may accept, whether from a summonsed witness or otherwise. Indeed, a similar provision was found in *Re United Glass & Ceramic Workers of America et al and Pilkington Brothers (Canada) Ltd. et al* (Ont. H.C.J.) (1978), 89 D.L.R. (3d) 737 to permit an arbitration board to rely on a previous inconsistent statement for the truth of its contents. There is no inconsistency between sections 105(2)(a) and 105(2)(c), and thus no reason to interpret the former as qualifying or limiting the latter in the manner counsel urges. As a result, we

conclude that we have a discretion as to whether we rely on evidence such as previous inconsistent statements and that we are not precluded from so doing by section 105(2)(a).

14. At the same time, we are not persuaded that we should depart lightly from the practice of the courts in this regard, particularly in the circumstances of this case. That practice, generally speaking, is not to rely on previous inconsistent statements as evidence of the truth of their contents. In *The Law of Evidence in Canada* (John Sopinka, Sidney N. Lederman and Alan W. Bryant, Toronto: Butterworths, 1992), the authors summarize the courts' approach at page 871:

When a prior inconsistent statement is proved after the witness has denied making it, it has only limited evidential value. Unless the witness concedes the truth of the contents of the previous statement, it does not become evidence of the truth of the facts contained therein. Its only purpose is to impair the witness' credibility and thereby may have the effect of neutralizing the witness' testimony. It only goes to show that the witness is not one who should be believed. The reasons advanced for and against the preservation of this rule are the same as in the case of a previous inconsistent statement that is proved on the examination of a party's own witness. Given the fact that the inconsistent statement is admissible only as evidence of the witness' lack of credibility, the judge or jury are not obliged to disregard all of the witness' testimony because of the contradiction, but they may give whatever weight to the evidence that they feel is appropriate in light of the contradiction.

15. This approach has been applied in the labour relations context as well. In *Canadian Labour Arbitration* (Morley R. Corsky, S. J. Usprich and Gregory J. Brandt, Scarborough, Ont: Carswell, 1991), the authors describe at pages 10-36 the rationale for the rule, which is based on "the reasonable principle that the arbitration should be decided on the basis of the evidence at the hearing, not on statements that people made at other times and places". While counsel for the respondent was able to refer us to some authorities critical of the courts' approach, including the minority opinion of Estey, J. in *McInroy and Rouse v. The Queen*, [1979] 1 S.C.R. 588, it is clear that the current state of the law is unchanged.

16. We are not inclined to depart from such a well-established rule in the particular circumstances of the matter before us. Leaving aside the broader debate with respect to the merits of that rule, in this case Ms. Baron has stated under oath before us that she did pay a dollar, and that her previous inconsistent statements were untrue. She has also offered some explanation for the discrepancy. While we find ourselves unconvinced by that explanation, the effect in this particular case is to render her credibility generally impaired. The result is that we have little confidence in her previous inconsistent statements as well. In addition, those statements were not made under oath or in comparable circumstances in terms of bringing home to Ms. Baron the importance of telling the truth. Indeed, if Ms. Baron did in fact volunteer this information to Mr. Miller while he was circulating a petition against the union, these circumstances strike us as particularly uncondusive to reliable statements about such matters.

17. Counsel for the respondent suggests that because Ms. Baron's previous statements were closer in time to the event of applying for membership, they are more credible. However, the only statement that was closer in time to the event was that alleged to have been made to Mr. Miller, which is also the only one that Ms. Baron does not acknowledge having made. All the other statements were made shortly before the hearing in this matter, and a considerable length of time after the event. Mr. Miller is not a disinterested witness himself, representing as he does employees opposed to the union. Moreover, Mr. Miller alleges that this statement was made while he was circulating the petition, that is, after these applications had been filed with the Board. As a result, the comments of the Divisional Court in *Re United Glass & Ceramic Workers, supra*, in this regard are not applicable.

18. In addition, Ms. Baron's previous statements were not by any means unequivocal. For the most part, they were qualified by considerable doubt on her part. In her testimony before us, she is now quite sure she paid the dollar. While her previous uncertainty raises significant questions with respect to her current confidence in this regard, it also suggests that it would be unwise to rely on her previous statements for the truth of what occurred.

19. Finally, during the course of the hearing, it emerged that there was other direct evidence available in the form of other individuals who may have witnessed the transaction. During the hearing, counsel for the respondent became aware of the identities of those individuals but did not indicate any desire to call them as witnesses. While in the circumstances of the case we understand why he might be reluctant to do so, at the same time we are not persuaded that we should rely on unsworn, equivocal and untimely statements where there was other direct evidence available to the respondent, and where direct evidence was in fact provided by Mr. Kaplanis.

20. Counsel for the respondent argued that if we do not accept previous inconsistent statements as evidence of the truth of their contents, the Board cannot accept and rely upon membership evidence, a form of written hearsay, as an indication of employee wishes where those employees subsequently sign a petition opposing the union. In his view, if we apply the courts' approach to previous inconsistent statements across the board, membership evidence could only be used to attack the credibility of a subsequent petition.

21. One of the flaws in this argument is that membership evidence, while it has been characterized as a form of written hearsay, is also a unique form of evidence with specific statutory authority and application, and numerous safeguards. (See *Roytec Vinyl Co.*, [1990] OLRB Rep. June 720 for a more detailed description of this statutory scheme and the institutional precautions taken by the Board.) Moreover, membership evidence is not necessarily inconsistent with a subsequent petition opposing a union. Indeed, the Board considers petitions to represent a subsequent change of heart by those employees who previously signed membership cards, not a statement that they never applied for membership. As a result, the analogy urged upon us is an ill-fitting one, and does not persuade us that the rule with respect to previous inconsistent statements should be abandoned in this case.

22. We therefore declined to rely on Ms. Baron's previous inconsistent statements as evidence of the truth of their contents, with the effect that there was no affirmative evidence before us that Ms. Baron did not pay a dollar in regard to her application. We were left with the testimony of Ms. Baron, about which we have expressed significant reservations, and that of Mr. Kaplanis, both of whom testified that a dollar was paid by Ms. Baron. Mr. Kaplanis' testimony about the dollar was unshaken in cross-examination, and a number of the respondent's assertions about his credibility were simply not borne out by the evidence. We concluded that regardless of where the onus of proof was located in this matter, on the basis of the evidence before us the allegation must be dismissed.

1408-91-R; 1496-91-U Ironworkers District Council of Ontario, Applicant v. **Canadian Communications Structures Inc.**, Respondent; International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Complainant v. **Canadian Communications Structures Inc.**, Respondent

Certification - Constitutional Law - Construction Industry - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. Trim* and *C. McDonald*.

APPEARANCES: *Bertha Greenstein* for the applicant; *Thomas Ward* for the respondent. [Messrs. Green and Geiger appeared for the applicant and respondent, respectively on the first day of hearing].

DECISION OF THE BOARD; July 14, 1992

1. This is an application for certification and a related complaint under section 91 of the Act. These reasons deal only with the constitutional question raised by the respondent in its reply. The parties wished the constitutional question to be dealt with before the issue of whether the work in question is properly considered construction under the Act. The employer takes the position that its operations are integrally related to those of Bell Cellular and Cantel, both agreed to be federal works or undertakings and subject to federal jurisdiction in matters of labour relations. The applicant takes the position that the respondent is engaged in the erection and maintenance of steel structures and is properly governed by provincial law. The Attorneys General of Canada and Ontario were advised of the constitutional question, but neither wished to intervene.

2. The following findings of fact are made on the basis of the evidence of the following witnesses: for the employer, Jeffrey Sopik, President of the respondent, known as CCSI, and Reimer Riske, a construction co-ordinator for Bell Cellular, and for the union, John Burke, CCSI's Rigging Supervisor. As will be seen below, the evidence is essentially not in dispute, but its characterization is very different depending on the parties' differing points of view, both literal and figurative.

3. CCSI installs, tests, maintains and services antennae for cellular phone systems. To date, this has been exclusively for two clients, Bell Cellular and Cantel, predominantly the former. CCSI's niche in the market appears to have two main roots. First is the experience in cellular technology of its president and founder, Jeff Sopik, who is a professional engineer with a background in radio system design. Immediately prior to setting up CCSI in mid-1990, he worked for Bell Cellular evaluating its technology and in the design and implementation of microwave radio connections to expand its cellular network in Ontario and Québec. The second root is its employees' ability to erect and climb the structures necessary to support cellular phone antennae. The dispute before us is in sum, a split on which of these two aspects of the operation is dominant for constitutional purposes. The parties are agreed that once in place, the structures supplied by CCSI are integral parts of a federal operation and that if the cellular phone companies performed the work done by CCSI themselves, it would be part of the federal operation as well.

4. Except for CCSI's first microwave project which involved improving the cellular system between Ottawa and Meech Lake, Québec, all of CCSI's work to date has been in Ontario. The

work done in Québec was done after the application date but the Board decided that for matters of constitutional jurisdiction it was appropriate to hear the evidence about this project. In any event, the respondent does not base its case on an argument that CCSI is an interprovincial operation, but rather that it is integral to the cellular phone companies' operations, which are interprovincial.

5. Although the structures which CCSI erects and installs could have applications for clients other than cellular phone companies, including clients who would be within provincial jurisdiction, there is no evidence before us that CCSI has done, or intends to do such projects.

6. Reduced to its very basics, a cellular phone network combines radio transmission and traditional phone systems to allow customers to have mobile phone service. It does this through a system of fixed radio relay sites. Each of these is equipped with radio equipment in a shelter (a radio shack), transmission lines and antennae. Each antenna grouping allows phone communications in a certain area, or cell. The antennae receive signals from, and send signals to, mobile phones operated by customers of the cellular phone companies. When a signal is received by an antenna, it is relayed through cable to a receiver which makes sense of it and allocates it by computer to a channel by which it can communicate to the fixed ("land") phone system by microwave, fibre optics or hard cable. If a call comes in for a mobile phone, the system sends out a signal to which the mobile unit can respond.

7. Cellular phone antennae are to be found on roof tops, poles, or towers of several varieties, depending on a number of factors including topography, cost and the wishes of the owner of the land on which the cellular site is to be located. Their support structures range in height from three feet on rooftops to upwards of 160 feet for certain towers. The location and tilt of each antenna precisely determines its geographical coverage, and is a matter decided by each cellular phone company. For internal reasons, neither Bell Cellular nor Cantel install their own antennae. For instance, Bell Cellular employees are not allowed to climb heights, and that is one reason the work is contracted out to companies such as CCSI. As Bell Cellular's Reimer Riske testified, they also employ contractors who do not need to be told how to get the towers up.

8. The specifications from the client are extremely detailed and require high quality performance because of the sensitive nature of the transmission system and its exposure to weather on a constant basis. CCSI is one of 3 qualified, pre-approved contractors who are invited to tender on Bell Cellular projects and one of seven who tender for Cantel. CCSI is not more important than any of the other similar companies to Bell Cellular. The client phone company makes all the decisions about what cell sites are to be worked on and what work is to be done on them, by what date. However, CCSI has made suggestions as to different ways to do things to the client which have been accepted. Normally those bidding will have a site visit before submitting the bid. With Bell Cellular, CCSI has attended "post-mortem" meetings after projects to give input as to better ways to do things.

9. Many projects require co-ordination with the phone company and/or sub-contractors to do work that is not within CCSI's tender or expertise. For example, a phone company contractor removed a drywall box on one project so CCSI employees could rearrange transmission cable. On other projects, CCSI sub-contracts roofing work made necessary by work on antenna mounts or foundation work to support towers. In the past it did some of this type work itself. Often the sub-contractor will be designated or approved by the phone company or the landowner. CCSI also sub-contracts with crane operators when necessary to lift tower parts into place. Prior to getting their own testing equipment, CCSI subcontracted for line testing equipment, although its personnel did troubleshooting and interpretation of the test results. Since mid-1991, CCSI has done all its own testing. On some sites, there will also be other contractors on site engaged by the phone company

to do other necessary work, such as erecting or enlarging an equipment shelter, building roads, fences or installing hydro service.

10. A very large quantity of the work done by the employees in the bargaining unit affected by this application is the real “nuts and bolts” work of putting up structures. This can involve pouring concrete, creating a load-worthy foundation, digging ditches, and does involve bolting steel together (or unbolting it), climbing it and rigging it with cable and steel antennae mounts. It also often involves lugging or hoisting steel to roof tops or other structures. Although as much rigging as possible is done on the ground, it can take a three or four person crew anywhere from six hours to 4 days to get material to the top, depending on what difficulties are encountered. Rigging a 200 foot tower with cable requires a clip every meter - a full days work for three or four men. Putting the cable connectors together involves precision soldering. Other than the employee who is actually operating the testing equipment, even testing involves physically manipulating antennae and dealing with weatherproofing tape. The employees in the desired bargaining unit do not have extensive training on the testing equipment, although some have attended a one-day seminar.

11. John Burke, who testified for the union, and described himself as a rigging supervisor, was a communication specialist for the Armed Services and has worked in microwave installations since for civilian industry. His training in the military involved antenna systems and installation of lines, connectors and how they should be made, problems on sweeps (line testing) and transmission lines. He was clear that it is very important for employees to be very careful with cable because of its function. He said the most important part of the job is the metal connectors on the cable, to provide continuity to make proper connection so the signal is not interfered with. He considers his speciality to be structures — how to get something up to support something.

12. Each cellular phone company is allocated a fixed number of radio channels by the federal Department of Communications. In high density use areas like Toronto and Montreal, a technique known as sectorization can be used to multiply the capacity of each channel to handle calls. This involves splitting the 360 degree coverage cell into smaller sectors, each with its own antennae so that it can operate as its own cell site. Sectorization services are one of the specialties of CCSI, and one of its arguments for federal jurisdiction. Accordingly, there was detailed evidence of its role in this process, which it is appropriate to summarize here.

13. Since no revenue is generated when customers can not make phone calls, as much preparatory work for the sectorization as possible is done while the system is still operational. Access to the sites for this purpose has to be arranged through the cellular phone company, who often has a roof-top lease arrangement with the landowner with restricted access. Typically CCSI employees are involved in positioning antennae and their mounts, laying cable and arranging for any necessary roofing work while the system is still operational. Much of the equipment is supplied by the phone company, such as the cable, although arrangements with phone company personnel are often made for CCSI to supply or pick up material of various kinds. Much of the advance work is done in the absence of Bell personnel.

14. On a designated cut-over day, often Saturday since it is a low use day, service will be cut for the affected cell site by phone company employees. CCSI personnel will be available to change or reposition antennae, reconnect and seal transmission lines and test the connections between the lines and the antennae. Positioning the antennae involves obtaining the right vertical tilt and horizontal location. This is done by CCSI personnel using compass, protractor and detailed topographical maps to get the directional positioning right. Each antenna's position is checked by a phone company technician. Personnel from the cellular phone company are also present to rearrange equipment inside the radio shack and connect the transmission lines readied by CCSI to the

radio equipment itself and to approve the work done by CCSI once CCSI has tested the antenna and transmission line system. Testing is done with equipment which simulates a phone signal and indicates if there is any problem in the transmission line. Although CCSI now has its own test equipment, phone company test equipment is often used as well, and test results are usually checked by the phone company's technicians. Once the testing is done, cables are labelled under the active supervision of phone company employees to ensure that the right antenna is attached to the right radio equipment. The phone company technician must sign off CCSI's work before they are free to go. CCSI employees wait for the phone company employees to do a coverage check with the system operational locally before they leave. During this check they may be asked to reposition antennae. They are then on call to rectify any problems that occur thereafter.

15. CCSI is responsible to hand over an antenna system which is capable of functioning, which includes for Bell Cellular, printed test results to Bell Cellular's specifications. CCSI's responsibility ends at the jumper going into the radio shelter. CCSI employees leave 5 feet of cable in the shelter for Bell employees to connect. Bell then does its own testing. Changes to software and hardware are also made in the main switch of the phone company by its own personnel. CCSI personnel do no work on the phone companies' radio or computer equipment. (Nor do they do any work directly for the phone companies' customers.)

16. The other main services provided by CCSI to the cellular phone companies are new installations of roof-top or tower structures to support antennae or microwave dishes and maintenance on existing installations. For the year 1991, the only full calendar year of CCSI's operation, approximately 50% of CCSI's work was referred to as maintenance. The rest was a combination of new site installation, sectorization or microwave installation.

17. In the category of preventative maintenance was a year-long contract CCSI had with Bell Cellular to inspect, inventory and report on each of 254 cell sites as to the structural integrity and condition of the supporting structures, antennae, safety equipment and property. This involved climbing whatever structures were involved, identifying antennae and testing things like torque on bolts and guy wire tension. Minor repairs such as minor rustproofing, adjusting non-microwave guy-wire tension, replacing worn tape and light bulbs were done on the spot. Other work brought to light by the inspections was tendered, some of which CCSI has since contracted to do. The reports categorized the work needed by order of urgency based on whether it affected safety or not. The inventory, inspection and minor repair work is done while the system is operational, and does not involve interruption of service.

18. Other work was referred to by the respondent as demand maintenance, for instance where a problem has been picked up by the cellular phone company or its customers, but has not been diagnosed. A problem anywhere in the system can affect the whole system and cause revenue loss because of the interconnectedness of the whole system, the reuse of frequencies and the overlap of coverage areas. CCSI employees have been asked to "troubleshoot", i.e. work on the transmission line and antenna system to isolate the problem, which will often be interference in transmission because of a problem with a connector caused by weather or a problem with the tilt of the antenna. On these occasions, a phone company technician will be there in the equipment shelter, giving instructions. The antenna being worked on has to be removed from service, as well as connected to the testing system from inside the equipment shelter, which a Bell employee does.

19. New installations involve the erection of appropriate structures to support the cable running from the radio shelter to the antenna and the antenna itself. On roof tops, this involves antennae mounts about 3 feet high, but in other locations, it involves erecting 120 foot steel monpoles or 160 foot aesthetic towers. CCSI supplies the tower, but the Bell Cellular provisions man-

ager may pick where to buy it from by tender. Sopik estimated for a monopole installation that 10 percent of the 500 man hours budgeted would be involved in the actual erection of the pole. The rest of the time would involve attaching cable and antennae.

20. Burke testified that CCSI determines hours of work and he takes his work instructions from CCSI.

The Parties' Argument

21. For ease of reference, we set out in approximate chronological order the cases filed and referred to by both counsel in argument, the citations of which will not be repeated below:

Letter Carriers' Union of Canada v. Canadian Union of Postal Workers (1973), 40 D.L.R. (3d) 105 (S.C.C.).

Butler Aviation of Canada Limited v. International Association of Machinists, [1975] F.C. 590 (F.C.A.).

Northern Telecom Ltd. v. Communications Workers of Canada (1979), 98 D.L.R. (3d) 1 (S.C.C.) (referred to as Northern Telecom I).

Construction Montcalm Inc. v. The Minimum Wage Commission et. al., [1979] 1 S.C.R. 754 (S.C.C.).

Northern Telecom Canada limited et al. v. Communications Workers of Canada et al., [1983] 1 S.C.R. 733 (S.C.C.) (referred to as Northern Telecom II).

W. Rourke Ltd., [1983] OLRB Rep. Oct. 1711.

Canadian Telecommunications Group, [1985] OLRB Rep. February 182.

Re Bernshine Mobile Maintenance Ltd. and Canada Labour Relations Board (1985) 22 D.L.R. (4th) 748. (F.C.A.).

Re Canada Labour Code (1986), 34 D.L.R. (4th) 228 (F.C.A.).

Re Ontario Energy Board and Consumers' Gas Co. et. al. (1987), 59 O.R. (2d) 766 (C.A.).

Waschuk Pipeline Construction Ltd. v. General Teamsters Local 362, (1988), 62 D.L.R. (2d) 318 (Alta. Q.B.).

IUOE, Local 793 v. Peter Kiewit Sons Co. Ltd., [1988] OLRB Rep. May 510.

LIU, Local 607 v. Vibration Assessment Limited, [1989] OLRB Rep. Feb. 223.

The following is a very brief account of the salient points of both counsel's able argument.

22. For the respondent, Mr. Ward, following Mr. Justice Dickson's opinion in *Northern Telecom I*, described the federal core undertaking as the transmission of cellular phone services throughout the country and CCSI's work as the installation, upgrading, maintenance and repair of

cellular transmission systems. Counsel says that the common thread in all CCSI work is that they are working on the cellular phone antenna system, an essential element to the functioning of the cellular phone system.

23. Employer counsel relies principally on the two Northern Telecom decisions, and asserts that the facts of this case are practically on “all fours” with *Northern Telecom II*. He argues that CCSI is even more involved than the Northern Telecom installers, who did no maintenance. He cites the continual give and take between CCSI and Bell Cellular. Referring to the *Letter Carriers* case, he notes that the truck drivers in that case were doing 90 percent federal work and were determined to be in federal jurisdiction; here CCSI does 100 percent work for a federal operation. Counsel observes that in *Butler Aviation*, servicing a federal aviation operation was sufficient to be deemed federal. Counsel distinguishes the *Construction Montcalm* case on the basis of the lack of continuity and regularity of contact with the federal work in that case, which is present for CCSI. In distinguishing the *Canadian Telecommunications Group*, he said that the proper distinction is work for customers, which Bell Canada could live with or without. He analogized it to a company who installed mobile phones in cars.

24. The union starts with the proposition that the onus is on the respondent to demonstrate that there is a reason why the prima facie provincial labour relations jurisdiction should not apply. Ms. Greenstein posits the question in the following manner: Can the province regulate this company without interfering in the operation of Bell Cellular as a federal undertaking? She says that it is absolutely clear that it could. It would have no effect at all. There is no direction of CCSI as to day-to-day conditions of employment.

25. Although the union does not dispute that the antenna system is essential to Bell, it disputes the idea that CCSI as a company is integral to its operations, making a distinction between the work done and the end use. Counsel suggests the appropriate analogy is putting up an addition to a Bell Cellular building. Once it is up and running it will be federal, but the construction company would not need to be considered federal. Counsel asserts that the new site and sectorization work is all construction or manufacturing. The dominant work here is putting up towers - straight construction of structural steel. Further, counsel argues that this is work of a temporary nature. CCSI goes in and gets out, much more like *Construction Montcalm* in that respect. Further CCSI makes none of the decisions as to location, or similar matters, that the court found could have made the work there federal. The mode of construction is within provincial jurisdiction, and that is what CCSI does. The union attaches a lot of importance to the fact that Bell Cellular people are prohibited from doing the work that CCSI does because of the climbing involved.

26. Counsel says the major distinction with the *Northern Telecom*, *Butler Aviation*, and *Letter Carriers* cases, is the extent to which the CCSI employees work in isolation. Counsel suggests that the only time the two groups of employees work together is cutover day. Most importantly, the union says there is no operational connection between the two, and therefore the facts fail the criterion cited as most important in a number of the judgements. The Northern Telecom installers, in the union's submission, participated much more directly in Bell's operations, including having the authority to “busy out”, which is equivalent to cutting service.

27. Counsel underlines that provincial regulation is valid on a federal undertaking as long as it reaches the federal undertaking on a valid provincial subject. She cites this case as analogous to the quirk of constitutional law cited in *Re Canada Labour Code*, whereby there is a certain class of work that if done by the core federal undertaking would be federal, but if done by a separate subsidiary operation is properly considered provincial. Citing the *Ontario Energy Board and Consumers' Gas Co.* case, counsel stresses that it is not the importance of Bell Cellular to CCSI that is at

issue here, but how important CCSI is to Bell. Counsel finds the *Vibration Assessment Limited* case conceptually similar to the facts before us. The work in that case was incidental to construction, not to Bell's federal undertaking, and thus was provincial.

28. Put most simply, the union argues that building a tower is provincial. The attachment of an antenna to it does not make it federal. The antennae are incidental to the work CCSI employees do as illustrated by the fact that they could be building lighting towers for municipalities. Finding this work to be in federal jurisdiction could create an odd mix of jurisdiction if CCSI does take on other work.

29. As to the maintenance work, union counsel suggests that it is Bell Cellular, not CCSI, who is maintaining the system. It does all the diagnosing of problems. The contractor is called in to climb and do the physical work. She suggests that the Northern Telecom installers were much more like the Bell Cellular radio technicians, doing ongoing diagnosis of the system. As to the maintenance contract, she says the purpose is to update information and inventory, and inspect structural integrity of sites, rather than actually working on the system. Changing light bulbs and grounding straps is incidental, and not enough to characterize the work in the union's view.

30. The union suggests that Bell Cellular has divided the work this way: We'll do the technical work and testing, people who know how to climb and build can do the rest of the work. She says the timing of the work and the need for quality is no different than any construction where things have to happen in a sequence, and work has to be done to proper standard. CCSI is on their own as to how to get the work done correctly and on time.

Decision

31. The basic principles in this area of constitutional law may be briefly stated; their detailed development can be found in the cases cited above. Labour relations are primarily in provincial jurisdiction. However, if the work is within a federal undertaking, or an integral part of one, labour relations will be within federal jurisdiction, since they are considered essential to the management of the undertaking. Where the operation is not the core federal undertaking, but an enterprise in some relation to the core federal undertaking, it is necessary to consider the nature of the relationship between the two, as a going concern, without reliance on microscopic distinctions, exceptional or casual factors, or the structures of corporate relationships, to determine whether the subordinate operation is necessary or integral to the core undertaking. The degree of integration is a factual call. Although there has been some commentary questioning the necessity for labour relations to be federal because of a close relationship to a federal core undertaking, the law as it now stands is that the jurisdiction over labour relations will follow the constitutional characterization of the operation. See the cases cited above and more recently, *Bell Canada v. Québec* (C.S.S.T) [1988] 1 S.C.R. 897 and the Court of Appeal decision in *Ontario Hydro*, [1991] OLRB Rep. Jan. 115.

32. As the Supreme Court of Canada's *Northern Telecom* decisions set out, the necessary inquiry can be conveniently done according to the following headings:

The general nature of CCSI's operation as a going concern.

CCSI provides a variety of services exclusively to cellular phone companies. Although it is relatively new, and there is no certainty about what work it will do in the future, there is consistency to date on the focus on cellular phone transmission systems, their installation, maintenance and the erection of the necessary structures for their support. This includes the physical work necessary to that end. Although the employees build towers and climb them, the purpose of that is for use in

the cellular phone system. CCSI is not, as a going concern, primarily a supplier of towers per se. It is, in part, an installer of cellular phone transmission systems and may supply the towers necessary to that end.

33. *The nature of the corporate relationship between CCSI and the companies that it serves, notably Bell Cellular.*

There is no corporate relationship between CCSI and its customers. The case law makes clear that this is not determinative. Subcontracting of work is not necessarily an indication that the work is not essential.

34. *The importance of the work done by CCSI for the cellular phone companies as compared with other customers.*

There are no other customers. The work for the cellular phone companies is clearly the *raison d'être* of the enterprise, and neither a casual nor an exceptional factor.

35. *The physical and operational connection between CCSI and the core federal undertaking, in particular the extent of the involvement of CCSI in the operation and institution of the federal undertaking as an operating system.*

To start, it is important to be clear on how we view the term “operating system”. The term cannot mean that the inquiry depends solely on the role of CCSI when the system is actually delivering calls to customers, which was how some of the discussion at the hearing appeared to categorize it. Otherwise, this would lead, for instance, to the result that the decisions such as where to put an antenna which is not yet in operation was not part of the core federal undertaking, when both parties agree that it would be. It is clear that the Supreme Court of Canada in *Northern Telecom II*, and the cases that precede it, was looking at this factor in the sense of the ensemble of the day to day operations of the core federal undertaking, and not just whether the system was “on” or “off”.

36. Viewed in this light, we find extensive physical and operational connection between the two, to the extent that CCSI's function is, in our view, integral to that of the undertakings of the cellular phone companies it services. The antenna and cable portion of the cellular phone system is agreed to be essential to the system and integral to it once installed. CCSI has regular contact with that system in a number of roles: installation, manipulation, testing, replacing, inspecting, always on the phone companies' sites. Although much of the work, preparatory and maintenance, is done in the absence of Bell Cellular personnel, it is all done to the detailed specifications of the cellular phone companies. Those aspects most directly relating to the transmission system are done under Bell Cellular's direct supervision. Thus, on the fourth criterion, we find the evidence to support federal jurisdiction. None of the other three detracts from this support.

37. To acknowledge that the location of these antennae requires elaborate support structures, which must be built and climbed, is not to make the purpose of the exercise any different. To acknowledge that from the point of view of the employee climbing steel at 150 feet, this project may seem like any tower erection project, does not answer the crucial constitutional question: how important is this work to running a cellular phone system? All of the evidence indicates that it is vital. Although *R. v. Ontario Labour Relations Board, Ex p. Dunn* (1963), 39 D.L.R. (2d) 346, [1963] 2 O.R. 301, where Telecom's manufacturing facility was found to be provincial, is good authority for the proposition that end use is not controlling, we are not here dealing simply with a manufacturer or a supplier of poles. We are dealing with a supplier of a variety of services to the cellular phone companies, which can include poles, but often does not.

38. We are cognizant of the respectability of opposing views on matters of constitutional jurisdiction. Judges, labour boards and commentators at all levels regularly come to well reasoned, opposite, conclusions on the same facts. Mr. Justice Laskin did not agree with the majority in *Construction Montcalm* where the construction of a federal airport was found to be within provincial jurisdiction. Mr. Justice Beetz, who wrote the majority decision in *Construction Montcalm*, did not agree with the majority decisions in *Northern Telecom II*, and would have found the installers' work to have been provincial. Mr. Justice Dickson, part of the *Northern Telecom II* majority, found the facts to be close to the line between federal and provincial jurisdiction, but apparently not close enough to have the general rule of provincial competence tip the balance, as Mr. Justice Beetz would have had it in his dissent. To the extent that the facts before us can be described as similarly close to the sometimes permeable constitutional divide, we find the decision of the Supreme Court of Canada in *Northern Telecom II* to be most persuasive. Although there are differences in the details of the work of the Northern Telecom installers and the employees of CCSI, they are, in our view, minor for the purposes of constitutional jurisdiction. For instance, although the installers apparently did mostly interior work installing equipment, including support equipment, which was not of the size that CCSI deals with, this has more to do with the mechanics of the "land" phone system than with the importance of the two kinds of installation work to their respective phone systems. Although the Northern Telecom installers had limited authority to curtail service on the Bell lines or operate it for training purposes, this was not evidently the predominant feature of their work. The macro relationship between the Northern Telecom installers and the Bell system is directly analogous to that of the CCSI metalworkers to the cellular phone system. CCSI is, on a regular basis, involved in the constant improvement of the cellular phone network. A similar finding was the crux of the court's decision that the Northern Telecom installers' labour relations were to be controlled by federal jurisdiction.

39. By contrast, the *Construction Montcalm* facts are very different from those before us. That company was a construction company presumed by the Court to have had a number of clients and projects over time. It was clear that once finished its work, the construction company would have nothing to do with the airport again. Each time CCSI hands over a supported transmission system, capable of functioning, there is a similarity. However, that similarity loses its force for constitutional purposes when one looks at the regularity of the work on the system, in its several varieties, including the inspection work and the jobs that flowed from it.

40. We have carefully considered all the authorities and arguments cited and find those which found provincial jurisdiction distinguishable. One distinction is the difference between operations whose only reason for being is to service a federal undertaking and those where servicing the federal operation is only one facet of the local operation. See on this point *Loomis Messenger Service*, [1985] OLRB Rep. July 1131. These include *Vibration Assessment Limited*, where an independent blast monitoring consultant was found to be within provincial jurisdiction as incidental to construction, despite its work monitoring the construction and installation of a Bell cable along a Trans Canada Pipeline right of way. Cases of infrequent construction or reconstruction such as *Re. Canada Labour Code*, where railway bridges were replaced or *Peter Kiewit*, where a canal lock was rehabilitated, are to be distinguished on the basis of the exceptionality of the work and the closer analogy to the facts in *Construction Montcalm* which one could describe as pure construction, which is not the case before us. *The Ontario Energy Board and Consumers' Gas Co.*, and *Canada Telecommunications Group* cases are to be distinguished on the basis of their not being integral to the federal undertaking, but a service to the customers of the federal undertaking. In *W. Rourke Ltd.*, where contractors who spent 90 percent of their time exposing cable for repair by Bell was found analogous to the construction work in *Construction Montcalm*, the Board said the result might have been different if the contractors were working on existing lines. Here CCSI employees

are working on existing lines, and are far more extensively involved in the general upgrading of the cellular system than the employees in that case.

41. For all the above reasons, we are of the view that we are without jurisdiction over these matters.

0490-92-R; 0491-92-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. The Douglas MacDonald Development Corporation c.o.b. **Chimo Inns**, Respondent v. Group of Employees, Objectors

Certification - Pre-Hearing Vote - Union making certification application on April 7 and, after reviewing employees lists, withdrawing application on May 6 - Union making subsequent pre-hearing certification applications for full-time and part-time employees on May 12 - After meeting with Labour Relations Officer and reviewing employee lists, union seeking to withdraw applications - Employer requesting that applications be dismissed, that six month bar on further applications be imposed, and that union's membership position in the applications be disclosed to employer - Board dismissing certification applications, but declining to impose bar or release union's membership count

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

DECISION OF THE BOARD; July 3, 1992

1. These are applications for certification, filed by way of Pre-hearing vote on May 12, 1992, for a unit of full-time and part-time employees respectively of the respondent in the Regional Municipality of York. Upon attending the usual pre-hearing vote meeting with a Labour Relations Officer of the Board and after a review of the lists of employees filed by the respondent, the applicant has requested leave of the Board to withdraw both of the present applications.

2. The applicant earlier, on April 7, 1992, had made an ordinary application for certification for the same employees of the respondent (full-time and part-time combined). After reviewing the list of employees filed by the respondent, it made an unopposed request to the Board, on May 6th, 1992, to have the application withdrawn, and the Board by decision dated the same day granted its leave. The respondent notes that in both that and the present applications there were filed as well by employees of the respondent statements of desire in opposition to the Union's application for certification (although with respect to the present two applications, to the extent that it matters on a pre-hearing vote application, it appears from the record that such statements were filed with the Board subsequent to the terminal date). On the basis of the foregoing the respondent submits that:

- (1) the application should be dismissed rather than withdrawn and
- (2) a six-month bar to any further application should be imposed, and
- (3) the respondent should be advised of what the membership position of the applicant was in the two applications that are being dismissed.

The grounds upon which these submissions are made are set out in a letter to the Board which reads as follows:

As you are aware, on April 7, 1992, the Union filed an Application for Certification (Board File No. 0070-92-R) relative to the employees of the Respondent hotel in the Regional Municipality of York.

After the replies had been delivered and the lists disclosed to the Applicant trade union, it requested the leave of the Board to withdraw the Application (May 6, 1992) which request was subsequently granted by the Board.

The Board declined to grant our request to disclose the count.

Following this withdrawal, the Union then on May 12, 1992 filed two additional Applications for Certification (Board File Nos. 0490-92-R and 0491-92-R) (one for the full-time and one for the part-time units) and requested a prehearing vote. The Applicant also requested that the Board provide it with the lists of employees as soon as possible. The terminal date was set for Friday, May 22, 1992 and a meeting with the Labour Relations Officer (Ms. Michelle Lapointe) was scheduled for Tuesday, May 26, 1992 at 10:00 a.m. at the employer's premises. Notwithstanding our express objection both in writing and to Ms. Lapointe to the disclosure of the lists to the Applicant in advance of the LRO meeting, we understand that the lists were given to Union counsel on Monday, May 25, 1992.

There were a considerable number of petitioning employees relative to all three proceedings.

On Tuesday, May 26, 1992, we attended with our client for the purposes of meeting with the Union and the LRO, reviewing any disputes in the bargaining unit, receiving the count, and, if the Union was eligible for a prehearing vote, to proceed with the necessary voting arrangements.

The meeting was convened at 10:00 a.m. at which point the Labour Relations Officer advised us that the Union wished additional time to review the lists. They were permitted well in excess of one hour to do so whereupon we were then advised by the Labour Relations Officer that the Union was withdrawing its Applications. We do not consent to such requests to withdraw these Applications for Certification.

In these circumstances, we wish to make the following submissions to the Board and we are quite prepared to attend any hearing in order to present verbal argument thereon.

1. The Applicant has seen fit to purport to withdraw both of the instant Applications in circumstances where it applied for a prehearing representation vote, an examiner had been appointed and had met with the parties.

The Board should accordingly decline to allow the Applicant to withdraw its Applications and instead, in accordance with Practice Note No. 7, should dismiss the Applications.

2. The Applicant has filed and purported to withdraw two separate proceedings (three Applications for Certification) within the last three weeks. They have been provided with full lists of the employer on two occasions within a very short space of time.

In these circumstances it seems clear that the Union is abusing the procedures of the Board by filling a multitude of applications in order to obtain frequent disclosure of the employer's lists for tactical objectives.

Having launched two separate proceedings within such a short period of time and then opting to withdraw from the processes, in our submission this is an appropriate circumstance for the Board to issue a six-month time bar against the Union. We accordingly request that the Board proceed to do so.

3. While we are aware of the Board's decision in *Centre de Rééducation Cor Jesu De Timmins*

Inc./Cor Jesu re-education Centre of Timmins Inc., on the particular facts of this case, three separate Applications were made and withdrawn within a very short space of time. The Union has been given a copy of the lists in each case. There was only one material dispute relative to the configuration of the bargaining unit. Both proceedings contained a large number of petitioning employees who were denied any meaningful role in the process because of the Union's withdrawals. No challenges were made to the lists on either occasion.

In all of these circumstances, we respectfully submit that in this particular case, it would be appropriate for the Labour Relations Officer to disclose to the employer the level of support filed by the Union as it appears to us that the Union is simply utilizing the Board's processes in order to obtain frequent discovery of the names on the lists while at the same time leaving the employer and employees affected by these proceedings in a knowledge vacuum.

All of which is respectfully submitted.

The respondent amplified those submissions in a further reply to the comments of the applicant as follows:

It is interesting that in the Applicant's submission, it has been unable to point to any decisions by the Board which contain facts similar to those which exist in this case. It is significant that in this particular case, the Union filed three applications for certification within a very short period and deliberately withdrew such applications to avoid a test of its membership evidence. In each case, the Union had been given the list of employees and a considerable number of employees had expressed their wishes by having filed petitions. This is precisely the type of situation where the Board must exercise its discretion to dismiss the applications and impose a 6-month bar in order to avoid multiple applications and to restore a sound employee/employer relationship.

Also conspicuously absent from the Applicant's submissions is any reference to the clear wording of the Board's own Practice Note No. 7, paragraph 5 which provides:

"Where, on an application for a pre-hearing representation vote, *after* an examiner has been appointed and *has met* with the parties, an applicant requests leave to withdraw its application, the Board in its endorsement has noted the request to withdraw and has dismissed the application."

This is precisely what occurred in this case inasmuch as (i) the Union sought a pre-hearing representation vote; (ii) an examiner, Ms. Michelle Lapointe had been appointed; and (iii) Ms. Lapointe met with the parties on May 22, 1992. After the commencement of that meeting and after having been provided with the lists of employees and extensively reviewing same for over an hour, the Applicant requested leave to withdraw its applications. The Board's Practice Note is clear that in cases such as this, the Board will exercise its discretion to dismiss the application(s).

With respect to our request for disclosure of the level of support filed by the Union, the Applicant simply suggests that to do so would be to "arm [the Respondent] with tactical knowledge in the event that the Applicant - or indeed any other trade union - should apply in the future with respect to the subject group of employees." This is not the case at all. We request disclosure of the count so as to confirm that the Union is simply abusing the Board's processes to itself gain a tactical advantage over the Respondent in that now it has obtained on three occasions a list of all of the employees whom the Applicant seeks to represent. It is also significant that there was virtual agreement on the appropriate bargaining unit in these applications such that to disclose the count would not be inconsistent with the Board's normal practice in any event.

Without repeating the submissions set out in our letter of May 26, 1992 upon which we rely in full to support our position, we find absolutely nothing in Mr. Flood's letter of June 3, 1992 that should militate against granting our requests for a withdrawal of these application, the imposition of a 6-month time bar against the Union and disclosure of the count.

All of which is respectfully submitted.

3. We agree with the respondent that the circumstances of the present two applications are such that they are to be dismissed rather than withdrawn. While the terms of Board Practice Note No. 7 may not be entirely clear in this regard, that Practice Note, tying the request for a withdrawal to the old “hearing” date scheduled by the Board, has not in fact kept pace with Board practice. As the Board noted in *Sheraton Parkway Hotel*, [1991] OLRB Rep. Feb. 271:

25. We agree with the applicant’s submission that a meeting with an officer, whether or not part of the “proceedings”, does not constitute a “hearing” in the way that term would normally be understood. In that respect there is some force to the applicant’s submission. We are also of the view, however, that we cannot properly determine the issue without considering other portions of the Practice Note and, perhaps more importantly, without considering the development of the role of the Labour Relations Officer in certification proceedings.

26. The importance of Labour Relations Officers in certification applications simply cannot be overemphasized. While at one time virtually every certification application may have resulted in a hearing before a panel of the Board, recent and current Board practice results in the vast majority of certification applications being resolved between the parties through the participation of a Labour Relations Officer. Until very recently certification applications were routinely scheduled on Fridays but rather than proceeding immediately to a hearing before a panel of the Board, the parties were directed to a Labour Relations Officer whose participation, far more often than not, resulted in the disposition of the application without the necessity of a hearing before a panel of the Board.

27. While that system was efficient in terms of disposing of applications, it had one significant undesirable effect. Numerous panels of the Board would be on “standby” to commence hearings. However, because of the high success rate of the Labour Relations Officers many of those panels were never required to sit (or, alternatively, even in cases where it was ultimately determined a hearing before a panel would be required, that determination was made so late in the day that it would make little practical sense to commence the hearing at that time). The result, of course, was that a significant amount of available panel time was left unused despite the large volume of cases (certification or otherwise) always currently before the Board.

28. In order to remedy that problem and to provide a more efficient use of Board resources, the Board’s standard scheduling of certification procedures has recently been changed. As in the present case, parties are no longer sent a notice of hearing with the implicit understanding that a meeting with a Labour Relations Officer will replace, or at least precede, the hearing. Rather, parties are advised that a meeting with a Labour Relations Officer will be held on the first Friday (Thursday, outside of Toronto) and a hearing will be held (if necessary) on the following Friday (or Thursday). In this fashion the Board is able to predict with a much higher degree of certainty how many applications actually need to be listed for hearing the following week. So far this new system appears to be serving the needs of both the community and the Board well.

29. Returning more specifically to the issue at hand we note that under the former procedure (meeting and hearing scheduled on the same day) an applicant seeking leave to withdraw at the meeting with the Labour Relations Officer and before the hearing would see its application routinely dismissed.

30. We attach no significance to the fact that there were two separate meetings with the Labour Relations Officer in the present case. However, we do not see why the applicant in the present case should be in any better position than the applicant described in the preceding paragraph.

31. Thus, while an extremely literal reading of paragraph one of the Practice Note might support the applicant’s position, it is clear that the paragraph was drafted prior to the recent change in the Board’s procedures. Thus, it could not have contemplated and, when read in conjunction with other paragraphs of the Note, does not contemplate or catch the facts with which we are currently dealing.

32. We have already indicated that we do not view the officers meeting as a “hearing” - the Officer essentially records the parties’ agreement and dispute, she performs no adjudicative func-

tion, delegated or otherwise. Consequently, neither can we conclude that paragraph 2 of the Note, which is linked to the “hearing”, applies and necessitates a dismissal in the present case.

33. The paragraphs of the Note which we find more helpful are paragraphs 4 and particularly 5. These paragraphs contemplate that once a Labour Relations Officer has met with parties in the context of the application contemplated therein, an applicant’s request to withdraw will result in a dismissal.

34. We see no reason why, in the context of the issue currently before us, an applicant seeking certification via the pre-hearing representation vote procedure should be treated less favourably than an applicant who follows the “regular” certification procedure. The reality is that (apart from differences not material to the issue currently before us including, of course, the critical distinguishing factor i.e. the holding of a vote prior to the hearing) there is now a distinct similarity in the procedures followed in both types of applications. The inconvenience to (all) parties of having to attend a Labour Relations Officer meeting is no greater in the case of a pre-hearing application.

35. Consequently in view of our conclusion that Practice Note No. 7 does not specifically address the situation currently before us but considering the spirit and intent of the Note as whole, we are of the view that the current applications ought to be and are hereby dismissed.

4. With respect to the imposition of a six-month “bar” to further applications, the practice of the Board in that regard was reviewed relatively recently in *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531. That case reveals that the Board even where a pre-hearing vote has been *held* but not counted has not been disposed to grant the imposition of a bar. As the Board noted from an earlier decision in *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091:

17. ... Except in very extenuating circumstances, the Board’s practice with respect to the imposition of a bar against an unsuccessful applicant is exercised only where a representation vote is held and the applicant fails to obtain the necessary majority to be entitled to certification. In such a case, the support enjoyed by the applicant among the employees of the company would be fully tested by a representation vote and the Board will not entertain a new application by the same applicant until such time as the employees have had a chance to properly reconsider their position. The Board does not consider repetitious applications where the membership evidence has been fully tested by a vote to be in the interest of sound Labour Relations.

And then commenting on its own:

17. No bar is ordinarily imposed when an applicant under section 7 fails to establish sufficient membership support in the bargaining unit to entitle it to a vote or who seeks to withdraw in the face of the possibility of such a failure. In our view, no bar should be imposed on an applicant under section 9 who is in a similar position, even though a pre-hearing representation vote has been conducted in the meantime. The fact that a pre-hearing representation vote has been conducted should only trigger a bar if it was clear when the request for withdrawal was made that the wishes expressed in the vote would have determined the success or failure of the application. No bar should be imposed by reason of the conduct of a vote where, as here, the applicant seeks to withdraw at a stage when its opponents are saying that it cannot be certified even if a majority of the ballots cast in the vote were cast in its favour.

...

19. There may be cases, as in “ordinary” applications, in which some further enquiry must be made about the circumstances in which withdrawal was sought before one can say how the Board’s discretion ought to be exercised under clause 103(2)(i) [now 105(2)(i)]. Once a request to withdraw is made, however, it makes little sense to engage in a further evidentiary enquiry in order to determine whether to bar further applications. If the propriety of a bar is not clear at the time the request is made, any further enquiry in that regard is best left to be pursued only if and when a subsequent application is filed: *Mathias Ouellette, supra*; *Mount Sinai Hospital*, [1985] OLRB Rep. Dec. 1780. We say this recognizing that if a pre-hearing vote were requested in a subsequent application and the prerequisites of subsection 9(2) were satisfied, the Board

would ordinarily conduct the vote and seal the box before entertaining evidence and argument with respect to the application of clause 103(2)(i): *The Corporation of the City of Gloucester*, [1989] OLRB Rep. Apr. 352.

5. That we see as the correct disposition of the present matter as well. At this stage the only real “disruption” to the various parties involved has been the time and expense of attending the Officer’s meeting. And it is precisely that time and expense that the Board has sought to relieve parties from, where possible, in its current practice of disclosure with respect to the “employee list”. As the Board noted most recently in *Polytarp Products* for example (Board File No. 3920-91-R, reported at [1992] OLRB Rep. April 502):

2. The Board recently set out its views regarding disclosure of the Employee List in *Cor Jesu* (as yet unreported), Board File No. 2718-91-R, decision dated March 16, 1992. As the Board there indicated, holding the List back from the applicant until the parties actually come together for a Board meeting or hearing is no longer acceptable. The List *ought* to be circulated and discussed prior to either such formal convening taking place, in the hope that the time and expense of either a hearing *or* a meeting can perhaps be avoided. That is particularly true in the case of a Pre-hearing Vote application, a procedure specifically designed to treat time as being of the essence, and where virtually any of the matters that may be in dispute are deferred until after the vote in any event.

3. In the present case, there simply was not the opportunity, given the receipt of the material, to involve a Board Officer in any kind of a “waiver” process, and a panel of the Board (Mr. Shamanski reserving) made the decision to circulate the List immediately, for whatever preparatory opportunity the weekend might provide for the applicant. In doing so, the Board noted that communicating the List on the Friday versus the Monday had no bearing whatever on the respondent’s concern over potential “abuse”. As the Board has stated in a variety of cases, the applicant would have an absolute right to see the List at *some* point in the proceedings, and the question of “abuse” is, as it always has been, simply one for the Board to address by way of refusal to entertain if and when a *subsequent* application for certification comes to be filed (again, see *Cor Jesu*, *supra*, and the cases cited therein).

This practice of the Board with respect to the lists is new enough that the objection of the respondent to their disclosure in this case might better have been brought to the attention of the Board for a ruling; the handling of the matter by the Officer was, we note, however, consistent with the views of the Board that had already been expressed in the above unreported decision in *Polytarp*. But on the respondent’s main point, it is the decision to “dismiss” at this stage which provides the Board the foundation to consider the exercise of a discretion “not to entertain” under section 105(2)(i), as indicated in *Amarcord*, *supra*, after hearing from the applicant, should a further application for certification in fact come to be filed in close proximity to the two proceedings already aborted.

6. On the question of releasing the applicant’s membership count to the respondent, counsel in his letter of June 26, 1992 refers to the “normal” practice of the Board once the matter of the bargaining unit has been agreed to. The sequence of the Board’s practice is set out in full, once again, in the *Cor Jesu* case referred to above, but that sequence in any event has no bearing upon a situation where the applicant has elected not to proceed with any further determination of its application. The relevance to the respondent to the application in those circumstances of the number of cards filed directly is not apparent. To the extent such information might go inferentially to the question of “abuse”, as suggested by the respondent in its letter, the Board has that information readily at hand, and can easily make reference to it on its own, should that question of abuse come before it in a relevant manner and time as discussed above.

7. For all the foregoing reasons the applicant’s request to withdraw is denied in this case, and the applications are hereby dismissed.

ADDENDUM OF BOARD MEMBER J. A. RUNDLE: July 3, 1992

1. While I concur with the majority decision I will make the following comments.
2. While the Board's practice with respect to the lists as set out in, *Polytarp Products* (Board File No. 3920-91-R) reported at [1992] OLRB Rep. April 502), is new, the respondent's objection, in the present case, to the disclosure of the lists *should* have been brought before the Board for a ruling.
3. Secondly, while I concur with the current disposition of this matter I would view quite differently a subsequent application and withdrawal involving the same parties. I rely on paragraph 19 in the *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531 quoted at page 10 of the present decision. Clearly a future application and withdrawal involving the same parties would, in my view, require the Board to enquire into the reasons for such a withdrawal request which would then determine how the Board ought to exercise its discretion under clause 105(2)(i).
4. Actions by the applicant of the sort described in this decision do little to encourage harmonious labour relations in the province.

4150-91-R; 0243-92-U; 0782-92-U Labourers International Union of North America, Local 506, Applicant v. **Crete Flooring Group Limited**, Respondent v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598, Intervener; Operative Plasterers' and Cement Masons International Association of the United States and Canada Local 598, Complainant v. Labourers' International Union of North America Local 506 and Crete Flooring Group Limited, Respondents; Labourers' International Union of North America, Local 506, Complainant v. Crete Flooring Group Limited and Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Respondents

Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *M. Pollock* and *Livio Balanzin* for Cement Masons Local 598; *Ronald Davis*, *Antonio Cornacchia* and *Michael Mihajlovic* for Labourers Local 506; *Antonio Disotto* for Crete Flooring Group Limited.

DECISION OF THE BOARD; July 8, 1992

1. This is an application for certification (Board File No. 4150-91-R) arising in the con-

struction industry, in which the applicant Labourers' Local 506 seeks to displace the intervener as bargaining agent and has requested that a pre-hearing representation vote be taken. The intervener Cement Masons' Local 598 has filed an unfair labour practice complaint (Board File No. 0243-92-U) against the Labourers' and the employer. In turn, the Labourers' has filed an unfair labour practice complaint (Board File No. 0782-92-U), and it relies upon the provisions of section 8 of the Act in support of its certification application.

2. Prior to the representation vote being directed, an issue arose over the question of voter eligibility. Because it appeared that application of the Board's customary voter eligibility rules would mean that no one could vote, and because the applicant requested it, a hearing was held prior to the vote. At the hearing, the Board reserved its decision, and directed that a representation vote be held, and that each ballot cast be segregated and the ballot box sealed, pending the agreement of the parties otherwise, or until the Board otherwise directed. We now provide our decision.

3. Ordinarily, when a pre-hearing representation vote is requested in a certification application, whether it arises in the construction industry or not, those eligible to vote will be those individuals who are considered to be employees in the voting constituency as of two different dates, both as of the terminal date and as of the date the vote is taken. (In pre-hearing applications, the appropriate bargaining unit is not determined until after the vote is held.) In non-construction pre-hearing vote certification applications, the voter eligibility requirements are described in terms of those employees who "are employed in" the voting constituency on the terminal date and the day the vote is taken, while in construction certifications, those eligible to vote are described as those "at work in" the voting constituency as of the same two dates. (See *City Plumbing (Kitchener Limited)*, [1987] OLRB Rep. June 810.)

4. Practice Note No. 9 describes voter eligibility requirements for pre-hearing representation votes. That Practice Note reads as follows:

APPLICATION FOR CERTIFICATION

PRE-HEARING REPRESENTATION VOTES

DATE FOR DETERMINING ELIGIBILITY OF VOTERS

1. Where a trade union, in applying for certification, requests a pre-hearing representation vote and the Board directs that such a vote be taken, it has been the practice of the Board, except in special circumstances, to direct that the employees in the voting constituency who are eligible to vote are those *in the employ of the employer on the terminal date* fixed for the application in accordance with Section 2 of the Board's Rules of Procedure.

2. If any party wishes to have eligibility determined as of some date other than the terminal date for the application, representations as to the reason therefor should be made to the Labour Relations Officer appointed to confer with the parties *at the time of the Labour Relations Officer's meeting*.

5. Practice Note No. 9 dates from August, 1964. It arose at a time when the Board applied similar practices to construction and non-construction certification applications. This is no longer true, and has not been the case for many years now. For that matter, the Practice Note itself does not reflect current practice, for it indicates that only one date is determinative, the terminal date, rather than the "two date" requirement.

6. The application date was March 27, 1992. There were employees of the respondent at work on that day. The terminal date was April 7, 1992. On April 8, 1992, the day after the termi-

nal date, in accordance with the Board's customary practice in pre-hearing representation votes, the parties met with a Board Officer, in order to indicate their positions on the issues in the application, including the description of the voting constituency and the description of the appropriate bargaining unit, and in order to make vote arrangements, including addressing the question of who were employees on the terminal date. This meeting with the Officer is held shortly after the terminal date because one of its purposes is to make vote arrangements, and by holding the meeting then, the parties are better able to assess which employees will meet the requirements of the first qualification for voter eligibility, to be at work in the voting constituency on the terminal date. The parties will not, of course, be able to know which employees will be at work in the voting constituency on the date the vote is held, the second customary qualification to be entitled to vote.

7. There were no employees in the voting constituency on the terminal date, as the employer had no work force that day. If the Board's usual eligibility rules were applied, the applicant would never be able to obtain a representation vote, a vote it is clearly entitled to by law, as no one would ever be eligible to vote. The matter was listed for hearing to address this problem.

8. The parties agreed, for purposes of this issue only, that there was at least one employee (not necessarily the same one) at work for the employer on each of May 5, May 8, and May 13, 1992.

9. The applicant Labourers' submitted that the customary dual voter eligibility dates for pre-hearing representation votes could not be applied here, as this would result in no vote being held at all. The applicant submitted that in the construction industry, it was not appropriate to use two voter eligibility dates. To have dual voter eligibility dates, both of which arise after the employer is made aware of the application, is an invitation to employers to gerrymander or in some fashion unduly influence which employees will be eligible to vote. The applicant submitted that there should be only one date for voter eligibility, the application date itself. Focusing on the application date would be consistent with the Board's general approach in construction representation proceedings (whether certifications or decertifications). In such proceedings, the Board considers the application date, for purposes of determining whether an applicant is entitled to automatic certification, or a representation vote. Focusing on only one date is consistent with the practice and reality in the construction industry. Further, submitted the applicant, picking the application date as the sole date for voter eligibility would eliminate any potential for employer gerrymandering of voter eligibility.

10. Alternatively, should the Board decide that two different dates for voter eligibility are appropriate, the applicant agreed that the second date should remain the date the vote is taken. Since no one was at work on the terminal date, it submitted that the first date should be the application date. Although the potential for gerrymandering by the employer would remain, since the employer could improperly hire people to work the day the vote is held, at least picking the application date as the first date would substantially reduce the likelihood of gerrymandering. The applicant acknowledged that the Board has historically looked to the application date for purposes of determining the "count" (the level of membership support amongst the total number of employees in the bargaining unit), or for purposes of determining the apparent level of support in pre-hearing applications, but where votes have been directed, the Board has traditionally looked to dates subsequent to the application date for purposes of determining voter eligibility. The applicant submitted there was no valid rationale for utilizing different dates for these purposes. To the contrary, submitted the applicant, it was more rational and more sensible, since the Board already focuses on the application date for purposes of determining whether a vote is held, to also focus on that date in order to determine which employees are eligible to cast ballots.

11. The intervener Cement Masons asserted that no vote ought to be held, since no employees were at work in the voting constituency both as of the terminal date and the date the vote is taken. When the Board at the hearing indicated some difficulty with this proposition, the intervener did not press the point.

12. Alternatively, the intervener asserted that the Board ought to continue to determine voter eligibility with reference to two different dates. If the Board were to insist on only a single date as determinative of voter eligibility, it submitted, the potential for gerrymandering, either by the employer or the applicant union, which gets to choose the application date, would be too great. The insistence on two different dates itself reduces the gerrymandering potential. If there is a suggestion of employer gerrymandering, the intervener submitted that such matters can best be dealt with by the filing of an unfair labour practice complaint. The concern for such abuse ought not to lead the Board to abandon its historical approach to voter eligibility rules. Further, submitted the intervener, the reason for picking two different voter eligibility dates is to increase the likelihood that those voting are substantially representative of the employees of the respondent. If the Board only allowed those employees at work on a single date to vote, there would be less chance that the voters would be a representative group of employees. By looking only to one date for eligible voters, submitted the intervener, the success of the application could more likely be determined by a non-representative group.

13. The intervener further submitted that the first of the two voter eligibility dates ought not to be the application date, as it would give an unfair advantage to the raiding union. It would give an applicant, in regular or displacement certifications, too great an opportunity to gerrymander, to strategically pick a particular date to file its application when it knew its members were present in significant, perhaps disproportionate numbers. Further, picking the application date would nullify the historical distinction between using the application date for purposes of the count and a subsequent date, here the terminal date, for purposes of determining voter eligibility. Accordingly, submitted the intervener, the Board ought still to use two dates for voter eligibility, the second being the date the vote is taken. The first date ought to be any one of the dates on which employees were at work in the voting constituency: May 5, May 8, or May 13, 1992. The intervener submitted that by picking one of those dates, after they have passed, the Board will have avoided any potential for gerrymandering, since the employer would have been unaware at the time that those at work on that date might form the group of employees who would be eligible to vote. Picking one of these dates would be fairest, in all the circumstances, to all the parties.

14. It is necessary to understand and appreciate the construction industry context in which this application arises in order to determine the appropriate voter eligibility requirements. In *Diplock Durable Floor Company Limited*, [1982] OLRB Rep. Aug. 1159, the Board had before it an application for certification in the construction industry. The Board wrote, as follows:

9. Unlike the situation in other industries, the Board's general practice in the construction industry is to count as employees of an employer only those persons actually at work for the employer on the day in question. This applies both when the Board determines who was an employee on the application date for the purposes of the "count", and also who was an employee on the date set to determine eligibility to vote in a representation vote. The Board's practice arises out of the transient nature of the work force in the construction industry as well as a resulting need for a clear set of practices regarding construction industry certification applications. Individual tradesmen frequently move from employer to employer. Further, when a tradesman is laid off, even for a short period of time, he often obtains alternate employment with another firm. In this regard, it is instructive to note that one of the individuals who worked for the respondent during most of March, namely Mr. Gomes, was included on the voters' list in the *Metro Concrete Floors Inc.* case, File No. 2657-81-R (which involved a contest between the

same two unions as in this case) on the basis of his employment by that firm during part of March, including March 31, 1982, the date set to determine voter eligibility.

• • •

11. We are not prepared to depart from the Board's practice of regarding as employees in the construction industry only those persons actually at work for an employer on the date in question. We would note that the policy is one that avoids uncertainty and lengthy disputes concerning who should be counted as an employee. In this regard, we would adopt the reasoning of the Board in the *Keystone Contractors Limited* case [1966] OLRB Rep. Feb. 821, where in denying a request that it not dismiss a construction industry certification application due to the fact that no one was at work on the application date because of a snow storm, the Board noted that its policy respecting who it will view as a construction industry employee is basically equitable to all parties and also lends itself to the expeditious disposition of certification applications which is a primary consideration in the construction industry. In the instant case, the Board set March 16, 1982 as the date for determining voter eligibility. In that the five individuals in question did not work for the respondent on March 16, 1982, we are satisfied that on that date they were not employed within the voting constituency. Accordingly, the segregated ballots of Messrs. Iwasjuk, Gomes, Fritas, G. Whie and J. White are not to be counted.

15. And in *City Plumbing (Kitchener) Limited*, [1987] OLRB Rep. June 810, a decertification application arising in the construction industry, the Board wrote as follows:

6. The Board has also long recognized that there is a difference between employment in the construction industry and non-construction employment. A major difference between the two is that employment in the construction industry tends to be intermittent and transitory relative to non-construction employment. A great deal of construction work is seasonal or subject interruption due to inclement weather. When they do work, construction employees tend to work in small crews and continuous employment with any given employer is often measured in weeks or months rather than years. In recognition of the differences between them, the Board has established a practice of approaching the two situations differently. For example, in both applications for certification and termination proceedings, the employer involved is required to file with the Board a list of employees in the bargaining unit so that the Board can, as it must, ascertain the level of employee support of the application before it. In proceedings relating to the construction industry, the Board counts only those persons actually at work in the bargaining unit on the date of application in determining the number of employees in the bargaining unit. In contrast, in non-construction proceedings, the Board does not require an individual to be at work in the bargaining unit on the date of application for purposes of the count so long as s/he was an employee in the unit on that day, and did actually work in it on at least one day in the thirty day period prior to and one day in the thirty day period subsequent to the date of application. Similarly, when a representation vote is held in the course of proceedings involving the construction industry, a person is entitled to vote if s/he was *at work in* the voting constituency on the date of the Board's decision directing the vote (or, where a pre-hearing vote is requested in a certification application, on the terminal date), and the day of the vote. In non-construction matters, on the other hand, an individual is entitled to vote if s/he was *employed in* the voting constituency on those two material dates. Being "at work in" the voting constituency requires an individual to be physically on the job. Being "employed in" the voting constituency does not require a person's physical presence at work so long as s/he has not been permanently removed from employment in the voting constituency. This distinction illustrates the Board's practice of focusing on specific dates in construction industry proceedings and on periods of time in non-construction matters, and it reflects the Board's attempt to accommodate the differences between the two employment situations.

7. Contrary to what counsel for the respondent suggests, so long as employment in the voting constituency is not terminated, in neither case does the Board require an individual to be at work in it for any minimum period of time, or at all, during the period between the two material dates in order to be eligible to vote. It would be impractical and unrealistic to impose any such requirement. It is to be expected that some employees will not be at work, or if at work not be performing work within the voting constituency, during some part, or all, of the period between the date of the Board decision directing the vote (or the terminal date in the case of a pre-hear-

ing vote), and the day the vote is taken. That is particularly true in the construction industry where the vagaries of employment are such that it is possible, even likely, that imposing a requirement that an individual perform work in the voting constituency during that intervening period would, in many cases, result in there being no one entitled to cast a ballot. The *Labour Relations Act* provides employees with an opportunity to join and be represented by a trade union in their employment relations with their employer, and also permits them to terminate that trade union's right to represent them, if they see fit to do so. It would be inappropriate for the Board to adopt procedures which would effectively deny either right. Furthermore, such a requirement could create uncertainty and invite protracted litigation, neither of which is desirable in labour relations matters, particularly those relating to representation rights.

8. The purpose of the Board's practices is to ensure that the persons affected by the outcome of a vote; [sic] that is, the employees in the bargaining unit affected, have an opportunity to participate in a representation vote where one is directed. To achieve that goal, the Board has formulated different approaches to employment in the construction industry and non-construction industry employment in response to the differences between the two employment situations. Some of those differences in approach have already been discussed. They are also reflected in the difference in the meaning that the Board has ascribed to the standard language it has long used to describe voter eligibility in representation votes in the construction industry compared to that in non-construction votes. In the result, in non-construction matters, a person need not be "at work in" the voting constituency at any time so long as s/he is "employed in" it. In construction matters, the same eligibility terminology has been made equivalent to "at work in" so that a person must be at work in the voting constituency on both of the material dates; that is, the date of the Board decision ordering the vote (or the terminal date in the case of a pre-hearing vote), and the day the vote is taken in order to be eligible to vote (see *Crowle Electrical Limited, supra*). This reflects the Board's attempt to strike a balance between the vagaries of employment in the construction industry and the object of affording affected employees an opportunity to vote.

16. Because of the nature of the construction, in certification applications arising in the construction industry the Board takes a "snapshot" of the state of affairs on the application date of the application. Focusing solely on the employee complement on that date, the Board determines the number of employees in the bargaining unit, and the level of membership support filed by the union amongst those employees. The Board does not have regard to all the principles or rules that apply in non-construction certifications. For example, the Board does not include in the bargaining unit those who meet the requirements of the "30-30" rule. It does not apply the principles of "build-up", where the Board defers consideration of the number of employees in the bargaining unit, or defers directing a vote, until such time as the employer work force is more stabilized, regular, or representative. In this respect, section 121(2) of the Act reflects the different context and approach to construction industry applications, stipulating that the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made. The legislation specifically encodes the right of the Board in construction applications to focus solely on the application date.

17. This practice is not new. In determining whether a certificate will issue automatically, or a vote be directed, the Board, in construction applications, has long considered the wishes of only those employees at work in the bargaining unit on the application date. The Board does not consider the wishes of those employees at work the day before, the day after, or any day other than the application date, for to do so would be inconsistent with how construction works, and would more likely be less fair and less representative. In *E & E Seegmiller Limited*, [1987] OLRB Rep. January 41, the Board clarified and reemphasized the extent to which the Board looks only to the employees at work on the application date. And see *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220. Whether the employees who were at work on the application date had ever worked for the employer before, or ever would again, it is only those employees at work on the application date whose wishes are taken into account in determining the merits of the certification application. It does not matter why a given individual might not have been at work on the application date.

whether for reasons of illness, lay-off, or whatever. If that individual was not in fact at work in the bargaining unit on the application date, then his/her wishes are not taken into account in determining whether the union is entitled to automatic certification, or, if the level of membership support is not sufficient for automatic certification (or if a pre-hearing representation vote is requested), is entitled to a vote.

18. In this context, where the Board looks to the “snapshot” of the application date already, and appropriately so, it is difficult to see why the Board should apply a two-date voter eligibility rule or why it should not also look only to the application date for voter eligibility.

19. The intervener submitted that the use of two different dates, with some meaningful interval between them, will increase the likelihood that a representative group of employees will be eligible to vote, and that those who must live with the vote results will be those voting. As already noted, this is not generally true in construction matters. To take other than a single representative day to determine voter eligibility is inconsistent with the historical reality of how the construction industry operates. And it is more consistent, fair, and representative to apply a practice whereby the group of employees that gets to determine whether the union gets certified without a vote, (if enough memberships are signed and filed for automatic certification), or whether it gets certified after a vote (where the level of support requires a vote, or where a pre-hearing vote is requested) is the same group of employees that gets to participate in any vote. Since the work force is so transitional and quickly changing, focusing on a different date or dates for purposes of voter eligibility will ordinarily result in a different group of employees getting to vote on the application than the group of employees that secured the right to the vote.

20. Picking a single date for voter eligibility would also serve to reduce the potential for gerrymandering, and reduce lengthy and expensive litigation over a number of issues, promoting certainty and finality. The potential for gerrymandering continues to exist when a date for voter eligibility has not yet arrived at the time the employer becomes aware of the application. To repeat, the work force in construction is often fluid, transitional and rapidly changing. Where the first date of voter eligibility is the terminal date, a date the employer is advised of when it receives notice of the application, the employer will be able, if it chooses, to significantly influence which employees are at work on that date, just as it can influence who is at work on the date the vote is held. We do not suggest that most employers gerrymander, only that some do and the current practice creates a significant potential for such abuse.

21. An employer’s actions are subject only to the union’s right to file an unfair labour practice complaint if it asserts that the employer breached the Act in its conduct in this respect (as, indeed, the Labourers’ assert here). (See, for example, *P & R Concrete Finishing*, [1978] OLRB Rep. Oct. 944; *London District Crippled Children’s Treatment Centre*, [1980] OLRB Rep. Apr. 461). Such an approach is not particularly satisfactory. First, this approach engenders litigation (as it has here) both over whether an unfair labour practice has been committed and over the list of eligible voters. Where a representation vote is to be held, it is important that the vote be held quickly. In regular certification applications, litigation may occur over a variety of issues with the sole purpose of delaying the vote in order to ensure that a new group of employees get to cast ballots. Prejudice caused by delay is particularly acute in the construction industry, given the constant turnover of employees and the transitional nature of the work force. The community, and the Board, have long been aware that delay in holding a vote in the construction industry will almost always be to the prejudice of an applicant union. Even when the vote is still held quickly, as here, litigation will delay the resolution of the application. Voter eligibility rules ought to reduce the potential for litigation delay, by providing greater certainty and clarity, and by reducing the potential for gerrymandering. A two date eligibility requirement, where both dates occur after notice has

been provided to all parties, can only increase the likelihood of less fair representation votes. Much of the type of litigation that has been occurring in this area would likely disappear if it were clear that only those at work on the application date will be eligible to vote, if a vote should be directed. Second, events may occur subsequent to the application date which cannot be shown to be an unfair labour practice, yet influence or affect who may vote. This might not be a problem if it were otherwise appropriate to allow those who are employees on a subsequent date to vote. But the fact remains that the appropriate group of employees to determine the success or failure of the application are those who were at work in the bargaining unit on the application date.

22. We do not agree that in a displacement application, as here, use of the application date for voter eligibility provides an unfair advantage to the raiding union. The incumbent union will have represented the employees during the term of the collective agreement, and the employees will generally be members of the incumbent union. Given these facts, it is neither apparent nor likely that a union attempting to replace the incumbent as bargaining agent will be unfairly advantaged by being able to choose, within the limited open period under the Act for bringing such applications, when to file the application. The applicant will have no influence on who the employees are on the application date. It only gets to select that date, within the open period. In any event, in construction applications there is nothing new in this. The applicant already gets to choose the application date, and the Board already focuses on the employees at work that day. On occasion, this no doubt results in tactical advantages to the applicant but there is nothing untoward or unfair in this.

23. Practice Note No. 9 indicates that the terminal date will be looked at for voter eligibility. That Practice Note was formulated and became effective approximately twenty-eight years ago, and does not appear to reflect the Board's current practice. The Practice Note recognizes that there may be "special circumstances" where use of the terminal date in pre-hearing votes will not apply. In our view, the traditional approach, reflected in the Practice Note, ought not to apply in the special circumstances of the construction industry.

24. Accordingly, in pre-hearing construction applications, as here, those eligible to vote will be those at work in the voting constituency on the application date, and in regular construction applications, those eligible to vote, if a vote is directed, will be those at work in the bargaining unit on the application date.

25. As there are other outstanding issues, including the unfair labour practice complaints filed by the Cement Masons and the allegations contained therein, the ballot box will remain sealed, pending the agreement of the parties otherwise. The complaint filed by the Labourers' (Board File No. 0782-92-U) will be listed together with the other proceedings. These matters will be relisted for hearing, to consider all matters, including whether the box ought to be unsealed and the ballots counted, and those matters raised in the submissions on the Officer's Report of the Vote.

26. This panel is not seized.

27. The matter is referred to the Registrar.

3418-91-R; 3523-91-U International Brotherhood of Electrical Workers, Local Union 1687, Applicant v. **Gorf Contracting Ltd.**, Respondent; International Brotherhood of Electrical Workers, Local Union 1687, Complainant v. Gorf Contracting Ltd., Respondent

Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *Mark Lewis* and *Larry Lineham* for the applicant; *Jim Hassell* and *Mark Norkum* for the respondent.

DECISION OF THE BOARD; July 22, 1992

1. These matters are an application for certification made under the construction industry provisions of the *Labour Relations Act*, and a complaint made pursuant to section 91 of the Act. The International Brotherhood of Electrical Workers, Local Union 1687 ("the union" or "Local 1687") seeks to represent a unit of electricians and electricians apprentices employed by Gorf Contracting Ltd. ("the company" or "Gorf"). The company takes the position that there were no persons in the bargaining unit on the date of application (February 5, 1992), as any electricians on site were either independent contractors, or were employed by Mike Norkum and not by Gorf. The complaint alleges that all electricians were laid off by the company when it found out about the application for certification. In addition to the remedies requested under the complaint, the union requests that the Board certify it pursuant to section 8 of the Act in the event that it is not otherwise entitled to automatic certification.

2. On the first day of hearing into these matters, the Board ruled that it would hear the parties' evidence and representations on all issues. Further, we directed the company to proceed first in presenting its case. Over the course of the hearing, we heard the evidence of Mark Norkum, Mike Norkum, Enrique Gaces, Andre Cecire, Doug Neely and Paul Reuben.

3. Mark Norkum is the president and general manager of Gorf. The company was started by his father, Alfonse, who is now retired. At one time, the company was managed by both Mark and his brother Mike. However, Mike Norkum left Gorf a few years ago. Gorf is the general contractor for the construction of a student residence on the campus of Northern College in Porcupine, Ontario. Its work on site began on October 1, 1991, and the scheduled completion date is July 31, 1992. The completion date is of vital importance to Gorf, since it is a provision of its construction contract that Gorf will be responsible for the cost of providing alternative accommodation for students who would otherwise be housed at the residence, if the residence is not completed on time.

4. Gorf entered into a number of subcontracts for the construction of the residence. It has a contract with a masonry subcontractor, a mechanical subcontractor, and an electrical subcontractor. Gorf also has a number of employees on site, including labourers, carpenters and operating

engineers. Until approximately January 21, 1992, the electrical subcontractor on site was PME Electrical Contractors Ltd. ("PME"). The electricians at issue in this application were all employees of PME until January 21.

5. Although Mike Norkum left Gorf a few years ago, he continues to have involvement with the company. On a previous Gorf project, he was retained to perform the role of a project superintendent. On this site, he was retained by Gorf to provide construction management services, with the responsibility to manage the subcontracts, Gorf personnel, expedite material, and generally ensure completion of the project on time and on budget. Mike Norkum is paid weekly by Gorf on the basis of submitted invoices. He is paid on an hourly rate, plus expenses. From time to time, he may be reimbursed by Gorf for various expenditures such as materials, equipment rental, or courier charges. As well, he has the expectation of a bonus upon satisfactory completion of the project. Gorf has a trailer on the site which consists of Mike Norkum's office and an adjoining print room.

6. As stated above, until January 21 PME was the electrical subcontractor working on the site. PME is a unionized company, being party to a collective agreement with the applicant. Its on-site foreman was Paul Reuben. On the afternoon of January 21, Mr. Reuben encountered problems in trying to purchase material from an electrical distributor. He telephoned a union representative in the Sudbury area (where PME's offices are located) and was told that there were rumours PME had gone bankrupt. He informed the three other electricians working on the site, Andre Cecire, Doug Neely and Gerry Trepanier. The workers decided that they had no options but to pack their tools and leave the site. Mr. Reuben informed Mike Norkum of this. Mike Norkum requested that the men remain on site for another day, until the situation was clarified. It was conveyed that the men would be compensated for that extra day. Paul Reuben's understanding was that Gorf would take care of their wages. Mike Norkum states that he told Reuben simply that somehow, he would make sure that the workers were paid for their services.

7. Mike Norkum informed Mark Norkum early the next morning of the rumour regarding PME, once the information began to appear more definite. Mike Norkum testified that in this conversation with his brother, it was agreed that Mark was to try and get confirmation of the PME bankruptcy, while Mike was to make arrangements with the electricians to keep the electrical work going. Both testified that they did not discuss the details of these arrangements.

8. It is uncontested that it was very important to Gorf that the electrical work continue uninterrupted. The work of the electricians was proceeding in pace with the work of the masonry subcontractor, since the electricians were installing components inside the masonry blocks. If the electricians did not continue their work, construction on the project would come to a halt. Mike Norkum testified that he was "dumbfounded" when he heard of the PME bankruptcy. Present in both brothers' minds was the onerous penalty clause in Gorf's construction contract if the project were delayed.

9. By the afternoon of January 22, it had been confirmed that PME was out of business. Mike Norkum arranged to meet with the electricians in the Gorf trailer at 2:30 p.m. to discuss further arrangements with them. By this time, Mark Norkum had started taking steps to look for another electrical subcontractor to take over the work. At the meeting at 2:30 p.m., Mike Norkum and all four electricians were present in Mike's office. Mark Norkum and Joe Sanguiliano, a consultant to Gorf were also in the office. Joe Weir, another Gorf consultant may also have been present. Mike Norkum reviewed the situation with the electricians, informing them that Mark was in the process of searching for a new subcontractor. In the meantime, he requested that they stay on site. He proposed a wage rate based on the rates paid by Gorf to its most skilled tradesmen.

Both Mike Norkum and Mark Norkum testified that Mark did not participate in this meeting, but was present in the room on other business. Mark, however, was aware of the nature of the discussion. Andre Cecire, Doug Neely and Paul Reuben testified that Doug Neely asked whether they would be receiving benefits, and Mark Norkum stated that Gorf only offered benefits after six months of employment. Mr. Cecire also remembers Mike Norkum stating that if they could not find a subcontractor for a reasonable price, they might keep the electricians for the rest of the job. Both of these comments are denied by the Norkums. The electricians left the meeting, discussed the offer amongst themselves, and then, through Mr. Reuben, told Mike Norkum that they would agree to stay for the wages offered.

10. The electricians testified that they left the meeting with the clear understanding that they would be working for Gorf. Mike Norkum testified that he never indicated to the electricians that they were being hired by Gorf. He states that his own assumption was that he would pay for their wages by personal cheque or cash. He saw the arrangement as informal and interim. His evidence as to who would bear the ultimate cost was somewhat contradictory. He states that if the arrangement had ended after a day or two, he may have absorbed the cost himself. However, he also testified that he assumed that once a subcontractor was chosen by Gorf, he would recover his costs. Mark Norkum states that although he did not know of the details of the arrangement, he took it for granted that the cost would be recovered from Gorf at some point. He stated that he did not ask at what rate the electricians would be paid. When questioned about this, he analogized it to Gorf hiring a backhoe, in which case he would not necessarily need to know the rate. In fact, Mike Norkum eventually submitted an invoice to Gorf for the cost of the electricians' services.

11. Ultimately, the electricians remained on the job until January 29. On January 29, Mark Norkum concluded a new subcontract with an electrical subcontractor. On January 29, the workers were informed that this subcontractor was to take over the job on January 30 and as a result their work was finished. During the period between January 22 and January 29, the electrical work proceeded much as it had before, with a few exceptions necessitated by the circumstances. As with many skilled tradespersons, the electricians required little supervision or direction. On one occasion, Mike Norkum directed them move the PME materials from the PME trailer, to inside the building. When the need for additional materials arose during this period, they were obtained through Gorf. On one occasion, Paul Reuben was given permission to use a Gorf vehicle to obtain materials from a supplier, paid for by Gorf. As before the bankruptcy, the electricians supplied their own personal tools. The PME trailer was still present on the site and the electricians continued to use it. The hours of work for the electricians were governed, as they had been before, by the needs of the masonry subcontractor.

12. There was conflicting evidence as to a number of the details of the terms of the arrangement during this week. Paul Reuben testified that he was given a handful of Gorf time sheets by Mike Norkum to fill out daily. Mike Norkum denies giving out Gorf time sheets, and states that he received a daily record of hours worked from Paul Reuben on scrap pieces of paper or verbally, and entered these into his personal job diary. He recalls that one day's record was submitted on a Gorf time sheet by Mr. Reuben. Paul Reuben also testified that Mike Norkum asked Roy Weir to pick up Gorf employment application forms from the office, which were then given to him to distribute to the electricians. He also asked Mike for TD1 tax forms, which were also given to him. Mike Norkum denies ever supplying the electricians with employment application forms, or TD1 forms. The other electricians testifying confirm that they were given both types of forms to fill in, by Paul Reuben.

13. On the morning of January 30, the electricians went back to the site to collect their paycheques and separation slips for the past week's work. Mike Norkum informed them that he

had no paycheques, or separation slips, but would be paying the workers cash. He indicated that this had not been an employment relationship. They were dissatisfied with this, and insisted on paycheques and separation slips from Gorf. The workers left with the situation unresolved.

14. The application for certification was filed by the applicant on January 24, 1992. Notice of the application was sent to the company by the Board on January 27, by Priority Post. This package was picked up by Gorf's financial controller on the afternoon of January 29, and placed on Mark Norkum's desk, who was not present in the office at the time. Mark Norkum testified that he found out about the application on the morning of January 30, and posted the notice of the application at the site that afternoon, at 2:30 p.m. Mike Norkum states that he found out about the application when Mark Norkum visited the site to post it.

Argument

15. As stated at the outset, Gorf takes the position that the electricians in question were engaged in work between January 22 and January 29 as independent contractors. In the alternative, it states that these electricians were employed by Mike Norkum, not by Gorf. On the unfair labour practice complaint, the company urges the Board to find that the end of the working relationship between the electricians and Gorf came about for purely business reasons, as the result of the arrival of a new subcontractor on site, rather than as the reaction of the company to news of the certification application.

16. Counsel for Gorf describes the arrangement which was struck between the electricians and Mike Norkum as a casual, stop-gap arrangement which was only intended to last until Gorf found a new subcontractor. In fact, the arrangement is not much different from situations where an electrician may offer out his or her services for small jobs for family or acquaintances. There was no intent on the part of anyone to create an employment relationship. On the facts, it is urged, neither Mark nor Mike Norkum exercised any control over the electricians, who continued with their work as they had before. The electricians brought their own tools to the site. They had the ability to maintain control over their work, and would be held responsible for faulty work on their part. Furthermore, in the circumstances, the electricians had the bargaining power to negotiate favourable terms for themselves, since their presence on the site was critical to the work on the project. In sum, counsel urged us to find that the situation in which the parties found themselves was a fluke, a one-time situation which will not be repeated. As such, it does not advance the purposes of the statute to find the existence of an employment relationship, particularly in view of the lack of any of the normal indicia of such a relationship.

17. Further, it was argued, if these electricians are considered by the Board as employees or dependent contractors, then their real employer was Mike Norkum, and not Gorf. Although neither Mark nor Mike exercised any day-to-day control over the electricians, it was more likely that Mike would hold such power. Mike Norkum bore the burden of remuneration. To the extent that the electricians saw Gorf as their employer, counsel urges us to find that this perception was acquired after the fact. The evidence shows, it is submitted, that the electricians never put their minds to this question before January 30. Prior to that, all negotiations occurred between Mike Norkum and the electricians. If they were in fact dependent contractors, the relationship was with Mike, and not with Gorf.

18. With respect to the unfair labour practice complaint, counsel states that the evidence is overwhelming that the arrangement with the four electricians came to an end before Gorf became aware of the certification application. The arrangement came to an end when it did for compelling business reasons, the arrival of a new subcontractor. All parties knew from the beginning of the arrangement that it was temporary. On January 22, Mark Norkum began looking for a new sub-

contractor, and finalized a deal with the ultimate successor company on January 29, to begin work on January 30. In his argument on all issues, counsel referred the Board to *Colonial Tavern Limited*, [1981] OLRB Rep. Aug. 1057; *Cross Canada Equipment*, [1980] OLRB Rep. Dec. 1736; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645; *Chukuni Lumber Company Limited*, 64 CLLC OLRB Rep. Jan. 1239; *Indusmin Limited*, [1977] OLRB Rep. Sept. 552 and *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679.

19. Counsel for the applicant submits that whatever test of employment relationship is applied, these electricians are employees. When PME went bankrupt, the electricians stayed on site, doing work exactly as they had before. There is no evidence that they ever agreed to become independent contractors. Their arrangement was not a contract at a fixed price. Rather, they were paid at an hourly rate, and submitted records of hours work for payment. In fact, the hourly rate offered to them was based on what Gorf paid its own tradespersons. The electricians had no chance of profit or loss out of the arrangement. The lack of supervision from Mike or Mark Norkum reflects their status as skilled tradespersons, rather than any lack of employment relationship. The tools that they brought to the job are the same as those which every electrician owns, and the same that they had brought when they were PME employees. The end of the relationship came as the result of a unilateral decision by Gorf, rather than at the end of a project or contract.

20. Further, as between Mike Norkum and Gorf, it is submitted that Gorf held fundamental control over the work of the electricians, and must be seen as the employer. The electrical work required on the project was initially part of Gorf's general contract. It entered into a subcontract transferring responsibility for the work to PME. When PME left the job site, responsibility reverted to Gorf, and not to Mike Norkum or the electricians. Any work that the electricians did was for the benefit of Gorf, and not Mike Norkum. The evidence shows that Mike Norkum does not hire his own employees or let out subcontracts. What he does for Gorf is maintain overall supervision of Gorf employees and sub-contracts. To the extent the electricians required further materials during the week of January 22 to 29, these materials were paid for by Gorf, and not Mike. To the extent that the respondent characterizes Mike Norkum himself as an independent subcontractor, counsel for the union submits that this is a legal fiction. Mike Norkum is not a subcontractor in the sense this term is normally applied in the construction industry. He does not hold responsibility for electrical work in the way that an electrical subcontractor does. On the certification issues, counsel relies on *Colonial Tavern Limited*, [1981] OLRB Rep. Aug. 1057; *Atway Transport Inc.*, [1989] OLRB Rep. June 540; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *Sirfran Construction Managers Inc.*, [1988] OLRB Rep. May 529; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645; *Ellis-Don Limited*, [1986] OLRB Rep. Aug. 1076; *Quorum Inc.*, [1984] OLRB Rep. Dec. 1760 and *Alwell Forming Limited*, [1978] OLRB Rep. Aug. 709. In particular, counsel urges that *Gilvesy* is indistinguishable from the present case.

21. On the unfair labour practice complaint, counsel submits that the timing of the discharges of the electricians raises suspicions. The fact is that every person who could have joined the union was laid off on the very day that the application for certification was delivered to the company. The circumstances leave an onus of explanation on the company. The union urges the Board to find that Mark Norkum must have known of the application on the afternoon of January 29, and that he would have called Mike Norkum right away upon discovering it. At the very least, the union urges the Board to find that the failure by Gorf to provide separation slips and paycheques on January 30 was motivated by the fear that doing so would prejudice their position on the certification application. Counsel submits that this constitutes discrimination against the employees

as a result of the application, and ask the Board to order the company to provide these to the electricians.

Decision of the Board - Certification Application

22. On the facts of this case, we agree with the applicant that the four electricians were employees of the respondent between January 22 and January 29, and are properly included on the list of employees in the bargaining unit on the date of application, January 24. Section 1(1) of the *Labour Relations Act* states that the term “employee” includes a person who is a dependent contractor. The term “dependent contractor” is defined in the Act as:

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

23. In the broad spectrum of economic relationships between two parties, therefore, the Act affords the same protection to the category of “dependent contractors” as it does to persons occupying the more traditional category of “employees”. The Board discussed the significance of these statutory provisions in *Airline Limousine*, [1988] OLRB Rep. March 225 as follows:

• • •

70. For collective bargaining purposes the Legislature has abandoned the traditional common law distinction between “employees” and “independent contractors”. Rather, the Act now identifies a hybrid creature - the dependent contractor whose rights depend upon the statutory definition, labour relations considerations, and the extent to which s/he is in an economic position roughly equivalent to those for whom this collective bargaining statute has been designed. The legal form of the relationship or the possession of particular assets (for example, the ownership of vehicles - something specifically mentioned in section 1(1)(h)) are no longer determinative of an individual's status for collective bargaining purposes. There is no requirement that s/he receive “wages”, as there was in the Alberta legislation under review in: *Re Yellow Cab Ltd. and Board of Industrial Relations et al.* [1980] 2 S.C.R. 761. The test is whether the disputed individual is more like an employee than a self-employed entrepreneur, when viewed from a collective bargaining perspective and the “mischief” which this labour legislation was designed to remedy. It remains, as always, a question of just where to draw the line, because no magic formula can be propounded for determining which factors should, in any particular case, be treated as determinative. The Board must necessarily perform a balancing operation weighing up the factors which point in one direction or the other, and assessing them in light of labour relations policy considerations.

24. In *Colonial Tavern Limited*, *supra*, the Board set out a number of factors which are of assistance in determining whether a person is a dependent contractor. We need not list them here. We are satisfied that an application of these factors leads to a conclusion that the electricians fall into the category of dependent contractors rather than independent contractors. We find that on January 22, the electricians were offered temporary work at an hourly wage. They did not carry on their own business between January 22 and January 29, just as they had not prior to January 22. Rather, they contracted to provide their personal labour to Gorf, just as they had to PME previously. In the circumstances, they had as limited control over the terms of their work as they had under PME. Within their area of skill and expertise, they went about their work without the need for direct supervision. However, it would have been a great surprise if they had chosen not to do their work personally, but to further contract out a portion of their work to others, or to change the manner in which they were working. It would also have been a great surprise if they, rather

than Gorf, had been found liable for any deficiencies in the work performed between January 22 and January 29. The work was Gorf's to be performed. The electricians were hired to do this work for the benefit of Gorf, and had no chance of profit or risk or loss under the arrangement. Gorf was responsible for materials, for timing and for the adequacy of the work.

25. The facts of this case are very similar to those in *Gilvesy, supra*. In that case, a drywall subcontractor of the respondent went into bankruptcy. The respondent asked the drywall tapers employed by the subcontractor to remain on the job to complete the work. The company stated that its intention was to secure the services of the men in question as independent subcontractors and not as employees. Like this case, the nature of the arrangement between the parties was never discussed. As in this case, the only matters that were discussed and agreed to was that the workers would continue to do the same work that they had done as employees of the subcontractor, for certain remuneration. The Board found the workers to be employees of the respondent at the material times.

26. The case before us is different in one respect from *Gilvesy*, and this concerns the role of Mike Norkum in retaining the services of the electricians. The respondent argues that if the electricians are found to be employees, they are employees of Mike Norkum, and not Gorf. In its submission, it was Mike Norkum who hired them and supervised them and exercised fundamental control over their work. As we have indicated, we are satisfied that the true employer of the electricians during the week of January 22 to 29 was Gorf. Mike Norkum may have been the person with whom all of the discussions as to the arrangements for that week occurred. However, in our view, this is the *only* factor that might point to an employment relationship with him. We need not determine whether indeed Mark Norkum took part in the discussion in the Gorf trailer on January 22, because even if we accept the evidence of Mark and Mike Norkum, Mark Norkum was certainly present in the room and heard what was being discussed. Mark Norkum had agreed with Mike earlier in the day that arrangements should be made to keep the electricians on the job. Mark Norkum understood that the cost of the electricians' services on the job for that week would eventually be borne by Gorf. In all of the discussions with the electricians or between the Norkums, there was no indication, until January 30, that Mike Norkum considered them as his employees (just as there had been no indication that they were considered as independent contractors).

27. Although Mike Norkum took the position with the employees on January 30 that they were not employees of Gorf, we are reluctant to give any weight to this, as it is a position taken after Gorf received the notice of the application. Despite his evidence, we are not convinced that Mike Norkum did not have know of the application by this time. Likewise, we need not give any weight to the electricians' evidence that they filled out Gorf application forms and TD1 forms during the week of January 27. It is not essential to our findings and as evidence of positions taken after the application was filed, we prefer in this case not to have regard to it.

28. What is clear is that for all parties, the priority was simply to keep the work going. The elements necessary to ensure this were the electricians' agreement to remain on the job and the parties' agreement on the wage rate. The lack of clarity amongst the parties as to a definition of the relationship does not militate against a finding that Gorf employed the electricians. What it necessitates, however, is that the Board review the evidence to determine the underlying relationship most consistent with the parties' actions and reasonable assumptions.

29. In *York Condominium Corporation and Sutton Place Hotel, supra*, the Board had to determine which of two corporations was the real employer of the employees in question. A number of factors were identified as being relevant to that determination. Among these are: the party

which exercises direction and control over the employees; the party bearing the burden of remuneration; the party imposing discipline; the party hiring the employees and having the authority to dismiss employees; the party who is perceived to be the employer by the employees; and the existence of an intention to create the relationship of employer and employees.

30. In our view, to the extent that there is any evidence about each of these factors, they point to Gorf as the employer. It would be unrealistic to elevate the relationship between Mike Norkum and the electricians to that of an employer and employees. Mike Norkum's job is to deal with various tradespersons and contractors on site, *on behalf* of Gorf. He does not have his own employees. He does not run his own business on the site, but provides his personal construction management services to Gorf at an hourly rate. Any expenses which he incurs in his work are passed on to Gorf. He cannot be compared to a genuine subcontractor which hires employees, supplies its own materials, and expertise, takes the risks and in all ways controls the work under the subcontract. Mike Norkum's function is to ensure that Gorf's interests are being served by the various people whom it has engaged to do work. His relationship with the electricians was not much different from his relationship with other Gorf employees on the site. Even if there are some differences, the interposition of Mike Norkum between Gorf and the electricians does not in our view change the substance of the relationship. As with those other employees, the ultimate control over the electricians lay with Gorf.

31. We briefly address the respondent's arguments regarding the labour relations logic in finding an employment relationship in an arrangement which only lasted for a week. As *Gilvesy* illustrates, the situation in which these parties found themselves was not unique. Unfortunately, bankruptcies do happen on construction sites. We are sympathetic with Gorf's predicament in this situation and accept that it probably entered into an arrangement whose consequences (in terms of the certification application) came as a surprise to it. However, to the extent that Gorf became, however briefly, the employer of these electricians, those employees have the right to organize and seek a bargaining agent.

Complaint of Unfair Labour Practices

32. We find on the facts that Gorf laid off these electricians because it entered into a new subcontract on January 29. Despite the coincidence in timing with the arrival of the notice of the application for certification, we are satisfied that the application did not play any part in the decision to lay off the workers. All parties were aware from January 22 that Gorf was seeking a new subcontractor. During the week of January 22 to January 29, various potential subcontractors visited the site. It was made clear to the electricians that Gorf wished to conclude a new arrangement quickly. We find that it was no surprise to them when they were told of their lay-off.

33. With respect to the company's failure to provide paycheques or separation slips, we are confident that our decision provides guidance to the parties in resolving this situation, if it is still outstanding. It appears to us that the company's position on these matters flows out of the litigation connected with the certification application. To the extent that this is now at an end and the parties have our determination on the issues, we are sure that Gorf will comply with its obligations on these matters.

Conclusion

34. We therefore find that Andre Cecire, Doug Neely, Paul Reuben and Gerry Trepanier were employed by the respondent in the bargaining unit on the date of application.

35. In this application for certification the applicant filed 4 combination applications for

membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

36. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 141(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

37. The Board further finds that this is an application for certification within the meaning of section 121 of the *Labour Relations Act* and is an application made pursuant to section 146(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 119 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

38. The Board further finds, pursuant to section 146(1) of the Act, that all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all other sectors within a radius of 81 kilometer (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

39. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 4, 1992, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

40. Section 146(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 146(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 36 above in respect of all electricians and electricians' apprentices in the employ of the Gorf Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

41. Further, pursuant to section 146(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of the Gorf Contracting Ltd. in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

3807-91-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 Affiliated with Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **The Hostess Frito-Lay Co.**, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Union seeking bargaining unit of company's drivers in the 2 Sudbury districts of its Northern Ontario region - Company submitting that only appropriate unit would include all its drivers in the Northern Ontario Region - Although union's proposed unit unusual, problems raised by company not so serious as to create an obstacle to an otherwise appropriate bargaining unit - Board finding evidence insufficient to endorse unprecedented Northern regional basis advanced by company as only appropriate bargaining unit - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and C. McDonald.

APPEARANCES: Linda Huebscher and Don Swait for the applicant; James B. Noonan, Jan. G. Van Der Moop and Jeff Fenerty for the respondent.

DECISION OF VICE-CHAIR, K. G. O'NEIL AND BOARD MEMBER C. MCDONALD: July 7, 1992

1. This is an application for certification in which the parties have been unable to agree on the description of an appropriate bargaining unit. The applicant is seeking a bargaining unit of the respondent's drivers in the two Sudbury districts of the respondent's Northern Ontario Region, while the respondent argues that the only appropriate bargaining unit would include all its drivers in the Northern Ontario region. Specifically, the applicant's proposed bargaining unit is as follows:

all employees of the respondent working in Sudbury, Sturgeon Falls, and Espanola, save and except supervisors, those above the rank of supervisor and office staff.

while the respondent's, as clarified at the hearing, is:

all employees of the respondent working in and out of Sudbury, Timmins, Sault St. Marie, North Bay and Kirkland Lake.

The applicant says that the districts other than Sudbury are simply too far flung to be in one bargaining unit, and that it chose a unit of this employer as close to the Board's normal description of a bargaining unit along municipality lines as the circumstances allowed.

The Facts

2. The following findings of facts were made on the largely undisputed evidence of Jeff Fenerty, the respondent's Regional Sales Manager for Northern Ontario. The applicant called no evidence.

3. The respondent sells snack foods, which it delivers to merchants' premises in Northern Ontario. The employees who do this delivery work are classified as salesmen, and drive trucks carrying the respondent's products along designated routes which are organized around five district centres in Northern Ontario. Two are in Sudbury with auxiliary "bins" (drop-off points) in Espanola to the west and Sturgeon Falls to the east. The other three are in Timmins, North Bay and Sault Ste. Marie. These are all administered out of Sudbury. Each of these districts has a manager who reports to Fenerty. There is a sixth district centre, Kirkland Lake, which is administered from Rouyn, Québec, but it was not disputed that it would be part of northern Ontario for labour relations purposes. From the respondent's point of view the northern Ontario region is one cohesive unit.

4. In 1989, the respondent was formed by the merger of two previous competitors, Hostess and Frito-Lay. At that time routes were set up for the new entity and employees were able to pick routes on the basis of seniority across the Northern Ontario region. Seniority was dovetailed for employees of the two prior corporations. Hostess had been unionized and Frito-Lay had not.

5. As new stores requiring product delivery open and others close, it is constantly necessary to restructure routes. The routes are organized so that they take approximately forty hours per week to do and have balanced workload and earnings (the salesmen are all paid solely on a commission basis). Between 1989 and 1992, the northern regional structure changed somewhat with the Sudbury district being split into two and the number of routes going from 33 to 38. On January 14, 1991, when Sudbury was divided into two districts, East and West, Sturgeon Falls was taken from North Bay and added to Sudbury East while Espanola was taken from Sault Ste. Marie and added to Sudbury West. These are the locations of the two bins which the applicant seeks to include in the bargaining unit.

6. Product is shipped from Cambridge, Ontario where there is a unionized production facility. A large portion of the product goes into the Sudbury warehouse and is shipped to Sault St. Marie and Timmins from there but districts can phone in their own orders to Cambridge. Movement of product occurs between districts when overages and shortages occur. What goes which route is organized according to what transport is available. There are 16 receiving locations, or bins, across Northern Ontario.

7. The respondent has approximately 43 employees, including a Sudbury warehouseman. The drivers are classified as either relief or regional salesmen. Regional salesmen are responsible for servicing customers and increasing sales in a designated area along set routes which can be changed according to the needs of the business. Relief drivers fill in for vacations, sicknesses or temporarily vacant positions. There are three relief drivers scattered around Northern Ontario, who may be assigned anywhere in the northern region. There is a chain sales representative who

splits his time half between the warehouse and half serving chain stores where the driver does not put the product on the shelf, as most of the drivers do.

8. District Managers ask employees if they are interested in moving or knowing about future vacancies. Vacancies are posted where relief people are stationed or where someone has shown interest in moving to a specific district. If more than one person is interested they are filled by seniority in the region.

9. As well as their regular route duties, salesmen are sometimes assigned special tasks which affect the whole northern region. These have included inventory control, computer and recycling projects, the formation of a health and safety committee (any of the three representatives are available to any employee in the northern region.) Delivery of racks, and the handling of shortages and overages is done according to availability, which does not always fall out along district lines. "Blitzes", of which there have been a couple in the last three years, are organized to concentrate resources on one area, for example, to boost sales. People can be transferred across districts for these events as well.

10. Usually meetings are held on a district level, although sometimes two districts will combine or a salesmen can go to another district's meeting. The only semiformal meeting attended by people from the whole region is the Christmas party, where everyone spends a weekend.

11. Payroll is centralized in Cambridge, Ontario, and personnel policies, wages and benefits, are province wide. Local administration of the northern region is done out of Sudbury, which is one cost centre. Problems concerning payroll are dealt with in Sudbury, as is preventive maintenance for the trucks.

12. Mr. Fenerty was asked by his counsel what the effect would be if the applicant were certified for the bargaining unit it seeks. He responded that it would mean two sets of everything to look after from an administrative point of view. As well he thought he might not be able to make good on promises he had made about opportunities in Sudbury for people from other districts. Further, he said he would not be able to restructure as he had been able to previously to run the day-to-day affairs of the business. He said he would be bound by the carved up district lines and that he could not change routes without bringing people under a new set of rules. He would have no problem with the union's having the whole northern region because that would be all one structure, with which he could work. He maintains that in 1989 he could not split the Sudbury district while the union was in.

13. The union's cross-examination focused on the fact that there had been a Sudbury district bargaining unit in place at the time of the merger, represented by another union. That union was decertified in October 1990, about a year and a half after the merger. The union asked about the various areas of concern expressed by Mr. Fenerty and how they had operated when the Sudbury district was unionized. The product was shipped much the same way as it is now. Transfer of relief staff was covered much the same way. Salesmen were available and could be required to go to other districts at all times. One employee came to relieve in Sudbury during the currency of the collective agreement. Posting of positions was handled differently for Sudbury. The authority of the district managers has not changed. The regional manager has always had the final say. The supervisory authority of the Sudbury district manager in 1989 is the same as that of the two district managers now in Sudbury. Sudbury was dealt with separately for some purposes, because the same information would not have applied to them at the time.

14. It was agreed that the Cambridge Hostess Frito-Lay plant is unionized and that the bargaining unit there covers the Municipality of London, dating from before the merger.

The Parties' Submissions

15. Employer counsel argued that the evidence showed that there was only one appropriate unit for the employees covered by this application. He referred to the Board's well founded aversion to fragmentation in deciding issues of appropriate bargaining units. Citing *Usarco Limited*, [1967] OLRB Rep. Sept. 526, counsel said that primary amongst the criteria in that case is community of interest. He stressed that the nature of work, the identical conditions of employment, the skills and the administrative structure of the employees are strong indicators of community of interest across Northern Ontario. He specifically cited the posting of positions, the interchange of personnel and the social events. In labour relations terms, the Northern Ontario region is *the* appropriate unit, in the respondent's view. There is functional coherence and dependence among the several districts. He argued that the only *Usarco* criterion that did not support the unit the respondent is seeking is geographical circumstances. On this point he stressed that the Board should not be intimidated by the distances in Northern Ontario, that everything is geographically disparate.

16. Employer counsel acknowledged the Board's jurisprudence to the effect that where there was more than one appropriate unit, the desires of the employees subject to the application would be accommodated if possible. His submission on this point was that given the evidence before the Board, there is not more than one appropriate unit. Rather, there is one functioning interdependent group, interrelated in every respect, doing the same business. To give the applicant's unit in this case, argues counsel, would be to say that if the union thinks there is an appropriate unit they should have it. In addressing *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250, counsel submits that it inappropriately assumes that the wishes of the employees are those of the union. He submitted in the alternative that the employees in districts other than Sudbury have probably never been canvassed as to what they think the appropriate unit would be. He therefore suggests an alternative under section 6(1): to canvass the wishes of all the employees in the wider unit proposed by having a vote among all the employees in the northern region. If there was a majority in favour then the matter would be functionally beneficial to both the union and the management.

17. Respondent counsel also acknowledged that aside from fluid situations or construction units, the Board tends to certify the municipality where the employer is. He underlined that this was not a hard and fast rule and cited various cases in which more than one municipality had been included. He submitted that these cases included situations where there was an integrated operation, regular interchange of employees, a shared community of interest: all of these things should be found on the facts before us. On this point he cited *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. Feb. 1178, *Brantox Holdings Limited*, [1969] OLRB Rep. Aug. 609, *Domtar Limited, Trucking Division*, [1970] OLRB Rep. July 495. He cited *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637 as an example of reasons to not go beyond municipality lines and said that none of those reasons exists here. He drew the Board's attention to the case of *The Globe & Mail Limited*, [1976] OLRB Rep. Nov. 662. The Board there found a province-wide unit to be appropriate. This was done despite the absence of any interchange, based on the employer's and union's past success in province-wide bargaining. Counsel referred to a recommendation to the Alberta Labour Relations Board by a Labour Relations Officer that the Teamsters' drivers for Hostess Frito-Lay should have an Alberta-wide unit. The union, which had proposed a unit of employees employed in Calgary and satellite depots, subsequently withdrew the application. He went on to say that far more significant was what the Teamsters and Hostess Frito-Lay had done in Québec. On a joint application of the parties in late 1970's they were merged into one province-wide bargaining unit. He suggested that the Alberta and Québec situation should lend some weight to what is appropriate in Ontario.

18. Also cited by employer counsel were *Bestview Holdings Limited*, [1983] OLRB Rep. Feb. 185, *Ontario Hydro*, [1980] OLRB Rep. June 882, *Brock Milk Transport Ltd.*, [1984] OLRB Rep. May 683 and *Coca-Cola Limited*, [1989] OLRB Rep. Jan. 1. for the advantages of a broader bargaining unit and the Board's willingness to award them in appropriate circumstances. As to the old bargaining unit in the earlier situation in Sudbury, counsel argued that it should have no weight. It was a unit inherited by successor rights, which predated the current corporate structure. The fact that it was decertified shortly after the merger should be an indication that it was not a viable unit in counsel's view. Counsel argued that to split the one northern regional functional unit would be to sacrifice the interest of the employees and management for short term expediency. He urged the Board to dismiss the application or order a vote and undertook that his client would be bound by the result.

19. Union counsel characterized the issue as a debate between efficiency for the corporate structure as opposed to the right of employees to organize. She maintains that the unit applied for is very appropriate both in terms of the manner in which the company functions and the geographic description. It is two districts of the five in Northern Ontario. It encompasses one municipality and two smaller outlying bins in Espanola and Sturgeon Falls because of the responsibilities of the District Managers. She argues that *Coca-Cola, supra*, does not support the employer's proposed unit but the union's. What the union was seeking in *Coca-Cola*, and which the Board did not grant, is analogous to a unit of Sudbury without the outlying bins. Additionally, if one of the outlying bin areas were described on a municipal basis there would be only one employee and thus they would be denied the right to collectively bargain. Counsel stressed the fact that it has been the Board's practice to not include people in widely separate geographical occasions unless there are compelling reasons. She argues that there are no compelling reasons on the evidence before us. She maintains that the corporate organization is not integrated to the extent each district cannot form an appropriate unit. On the evidence of regional interchange, counsel maintains that it is not as weighty as employer counsel argued. Employees are not interchanged on a daily basis. It is not the kind of situation where an employee will be one day in North Bay and the next day in Sturgeon Falls. It is only where there is an opening in another district or in very specific situations which may or may not happen.

20. Counsel stressed that the Sudbury people wished to be represented by a union and that the Board should not deny that right. She maintains that the dismissal of the application would defeat their expressed wish to be represented and to engage in collective bargaining. She maintains that the history of what happened in the previous Sudbury bargaining unit, irrespective of the fact that it was inherited, shows that the unit is a viable bargaining unit. Seniority was dovetailed in the Sudbury area and a collective agreement negotiated subsequent to the merger. She asked the Board to infer that the employer was able to operate and that thus it can be a viable unit or at the very least, that there were not insuperable problems. The fact that the employer would prefer not to have to deal with the union in one location is not a reason to deny the Sudbury employees the right to bargain. She cited the fact that there is a bargaining unit in London and one in Cambridge and not a Southern Ontario wide unit to show that a smaller unit can be viable with this employer.

21. Union counsel cited *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755 and *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. In those cases the Board gave certificates for single stores despite membership in a chain of stores. She submitted that the northern Ontario region is analogous to the chain of stores. In replying to the cases cited by employer counsel, she suggested that much of the Board's jurisprudence is based on the idea that what the parties had done in the past is *prima facie* evidence of an appropriate unit. In *Bestview Holdings Limited, supra*, for example, they had a prior large unit and the Board found that that was *prima facie* appropriate and that is the context in which the statements of the Board about bigger being

better should be viewed. Similarly, her client is looking for the same unit as was there before the merger, which should be *prima facie* viable and appropriate. She argues that since the parties have not developed a broader structure here it does not make sense to go in that direction. Counsel asserts that the Board should be very concerned about the distances between the municipalities involved in the employer's proposed description. She points to the fact that despite a very occasional meeting there are regional meetings. The company operates with five distinct districts under one regional manager.

22. Union counsel argues that a vote is not an appropriate mechanism to determine the employees' wishes here. The Sudbury employees have made their wishes known and counsel questions the usefulness of the results of such a vote.

Decision

23. Since the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board has made it plain that there are many cases in which there is more than one bargaining unit configuration which can be considered appropriate. It suggests a focus on the applicant's bargaining unit in the absence of serious labour relations problems to the employer.

24. Turning first to the applicant's request, the unit proposed is unusual because it provides more than the Board's usual description, i.e. it is more inclusive than a standard municipal wide bargaining unit. The first issue in this case is whether it is not likely viable because of its place in the administrative unit chosen by the employer, i.e. the Northern Ontario region. The municipality of Sudbury and the two outlying regions is a significant size bargaining unit and represents over a third of the respondent's thirty-eight routes in Northern Ontario. When analyzed according to the *Usarco*, *supra*, criteria, there is little to suggest that the unit is inappropriate. Although the employer argues the economic factor, that there is an economic advantage to complete flexibility within the northern region, it is to be noted that *Usarco* was concerned with transferability between two yards which were both in Hamilton and only 2½ miles apart. We will address this further below. None of the other criteria, source of work, centralized management authority and community of interest indicate that the two Sudbury districts would be inappropriate for collective bargaining.

25. Having regard to the formulation in *The Hospital for Sick Children*, *supra*, the central question is whether there are serious labour relations problems presented by the applicant's proposed unit. The problems raised by the employer are not so serious in our view as to create an obstacle to an otherwise appropriate bargaining unit. None of the issues raised are ones which cannot be bargained about. The applicant's proposed unit is not incompatible with the respondent's administrative structure, in any event, since it is modelled along lines of its own making - its two Sudbury districts. The discussions in *Famous Players Inc.*, [1990] OLRB Rep. May 509 and in *Carecor Security Service Inc.*, [1991] OLRB Rep. Aug. 962 demonstrate that administrative inconvenience is not necessarily a barrier to a certification for a smaller unit than the respondent wishes and that bigger is not always better in the eyes of the Board.

26. In *MacDonald's*, *supra*, the Board found that the extent of transfers demonstrated on the record was minimal and did not tend to create such a relationship among the several MacDonald's restaurants in Windsor to demonstrate that they should be forged into one bargaining unit, or that collective bargaining in one store would have an adverse impact on the operations of the other stores in Windsor. Similarly, we are not of the view that the effect of transfers, even of the "blitz" variety is so extensive as to warrant the fusion of the whole northern region. *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330 is an example of a case in which the employer was

seeking all of the branches in the employer's administrative division of south-western Ontario. In that case, in granting the applicant's request for a single branch unit, the board said as follows:

9. ...

It is also possible, of course, that different communities of interest will exist at one and the same time among several different groupings of employees. Obviously certain common employment interests exist among all employees of the respondent in Canada; the portion of those employees who are within Ontario have a further common interest; and the group of employees working under the direction of the London regional office have employment interests in common that they do not share with their fellow employees elsewhere in Ontario or in Canada at large.

We believe that the situation is analogous here. There is no doubt that a community of interest is shared, as argued, by the larger grouping of the respondent's employees in the Northern Ontario region. This is not to say however that the more normal contours of a municipality (albeit with the unusual adjunct of the outlying bin) does not also describe a group of employees with a community of interest.

27. Although the Board is not "intimidated" by the large distances in Northern Ontario, there are significant disincentives to cohesion in a bargaining unit that is flung over a such a wide geographical area. The Board's jurisprudence is replete with examples of findings of the viability of a single unit within a municipality. We find the evidence insufficient to endorse a totally unprecedented Northern regional basis as the only appropriate bargaining unit. Nor do any of the precedents cited stand for that proposition.

28. In weighing the various facts in this case, the evidence about the prior existing bargaining unit is not particularly weighty. The fact that the union was decertified is equivocal. It could indicate many things, including that the structure of the bargaining unit was not appropriate, that the membership had completely changed and was not then desirous of collective bargaining at all, or that the bargaining agent was not suitable for them. However, the evidence of the previous existence of the Sudbury bargaining unit and the capacity to conclude two collective agreements is some evidence supportive of the viability of the unit proposed by the union.

29. As to the wishes of the employees, we have no reason to doubt that the employees affected by this application as made are represented by the applicant. We do not find there to be sufficient reason to have a referendum on the appropriateness of the bargaining unit.

30. For all these reasons the Board finds the applicant's proposed bargaining unit to be appropriate for collective bargaining.

31. The Board finds the applicant to be a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

32. Having regard to the material before us, there were sixteen persons on the list of employees. The applicant submitted membership evidence for nine of them. The Board is in receipt of several statements of desire in opposition to the union's certification. However, none of them overlap with the evidence of membership in the applicant, and thus they are numerically irrelevant to the application.

33. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 10, 1992, the terminal date fixed for this applica-

tion and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

34. A certificate will issue to the applicant for the following bargaining unit:

all employees of The Hostess Frito-Lay Co. working in Sudbury, Sturgeon Falls, and Espanola, save and except supervisors, those above the rank of supervisor and office staff.

DECISION OF BOARD MEMBER J. A. RONSON; July 7, 1992

1. The Applicant union requests a certificate for a bargaining unit that encompasses the Municipality of Sudbury and the towns of Sturgeon Falls and Espanola. If the Board were to grant this request it would deviate from its normal practice with respect to the scope of the bargaining unit.

2. Taking the union's lead, the Respondent employer argued that if the Board was inclined to expand the scope of the usual bargaining unit(s), then it should find that its entire Northern Ontario region is the appropriate bargaining unit.

3. I don't think an employer could present better evidence in support of its request for an all encompassing unit, than the evidence of control and integration that was put before the Board in this case.

4. In my opinion the principles enunciated in *The Hospital for Sick Children* case, *supra*, have no application to this particular case. No matter what is said this case boils down to a matter of distances.

5. Of primary concern, of course, is the evidence that is before us regarding the wishes of the affected employees in Sudbury, Sturgeon Falls and Espanola.

6. If we were to depart from the normal Board practice then the evidence before us dictates that the bargaining unit be enlarged to include all of the Northern Ontario region, rather than being restricted only to Sudbury, Sturgeon Falls and Espanola. But I do not think that this is a situation where the Board should or need deviate from its normal practice.

7. The Applicant union is entitled to be certified as the bargaining agent for those employees of the Respondent employer in the Municipality of Sudbury, and I would so order.

0348-92-G Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters & Joiners of America, Applicant v. **Municipality of Metro Toronto**, Respondent

Adjournment - Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *James Nyman* and *Ucal Powell* for the applicant; *Darrel Smith* for the respondent; *Lawrence F. Ryan* for Bemar Construction (Ont.) Inc. and *John Calderon* for Framing Design A. Div. of 948641 Ontario Limited.

DECISION OF THE BOARD; July 10, 1992

1. In this Referral of Grievance to Arbitration, the Board delivered an oral ruling at the Hearing on May 27, 1992, denying intervener status to Bemar Construction (Ont.) Inc. ("Bemar") and Framing Design A Div. of 948641 Ontario Limited ("Framing Design"), among other things. This oral ruling was reduced to writing on June 10. The Board is in receipt of a letter from Bemar dated June 30 that it will treat as a request for reconsideration.

2. First, we provide our reasons for the rulings of May 27. This matter began as a grievance filed on January 29, 1992 by the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America ("Local 27") against the Municipality of Metropolitan Toronto ("Metro"). The grievance alleges that work covered under the collective agreement between Local 27 and Metro is being performed by other than members of Local 27. The grievance names the Coronation Park job site, and seeks as remedy compensation to the union and/or its members. On April 28, this grievance was referred to arbitration pursuant to the provisions of section 126 of the *Labour Relations Act*. A hearing in this matter was scheduled for May 27. As well, a Labour Relations Relations Officer was appointed to confer with the parties to endeavour to effect a settlement of the grievance prior to the hearing. By fax dated May 4, the Officer appointed notified the parties of a pre-hearing meeting to be held on May 21 at the Board's offices. Both a Notice of Hearing dated May 4, and the fax from the Board Officer made reference to the scheduling of this matter for hearing on May 27.

3. At the hearing of May 27, Bemar and Framing Design appeared before the Board through their representatives Lawrence Ryan and John Calderon, respectively, requesting an adjournment of the hearing to seek counsel, and status to intervene in the proceedings. As well, Bemar and Framing Design faxed identical letters to the Board on May 27 containing their requests for an adjournment and notice of intent to intervene.

4. We are informed that counsel for the respondent notified Bemar and Framing Design of the pre-hearing meeting and of the hearing, by fax on May 19, which fax also enclosed copies of the Notice of Hearing and notice of the pre-hearing meeting. Both companies had representatives at the pre-hearing meeting of May 21, and at that time indicated their intention to intervene in the hearing. Also at that meeting, the applicant's counsel advised the two companies of the applicant's

intention to oppose the request to intervene. In their request to adjourn the matter on May 27, the representatives of the two companies indicate that they require time to seek counsel. This request was opposed by both the applicant and the respondent who take the position that the companies have had adequate notice. The Board agreed with the applicant and the respondent ruling that the two companies have had sufficient time to retain and advise counsel if they had so chosen. They were both present at a meeting with a Labour Relations Officer on May 21 with respect to these issues. By that meeting, at the latest, they were aware of the date set for the hearing of this matter, and also aware that their request to intervene would be opposed by the applicant.

5. With respect to the request of the two companies to intervene, Mr. Ryan and Mr. Calderon submit that Bemar and Framing Design have a financial interest in the outcome of the litigation between Metro and Local 27. Metro does not dispute that it is bound by a collective agreement with Local 27. It also acknowledges that the work that is the subject of the grievance is covered by the collective agreement. This work has been sub-contracted by Metro to Bemar. Bemar in turn advised Metro it has sub-contracted the work to Framing Design. Metro states that the terms of its contract with Bemar requires Bemar to use union contractors. Metro states that if the Board orders Metro to pay damages arising out of a violation of the collective agreement, Metro intends to deduct the value of those damages from its contract price to Bemar.

6. Also, although Mr. Ryan and Mr. Calderon did not elaborate to any great length, it appears that Framing Design takes the position that it is bound to a collective agreement with Local 27. Thus, Bemar takes the position that it is in compliance with its contract with Metro. Apparently, Framing Design alleges that it entered into an agreement with Local 27 to sign a collective agreement. Nothing was signed, because Local 27 had a change of mind. However, Framing Design considers that the agreement to sign a collective agreement binds the two parties to the Local 27 collective agreement (a proposition which on the facts alleged we view with considerable doubt, given the definition of "collective agreement" in subsection 1(1) of the Act). Metro Toronto takes no position on whether or not there is a collective agreement relationship between Framing Design and Local 27. Local 27 takes the position that it is not bound to any collective agreement with either Bemar or Framing Design.

7. Metro does not oppose the request by the companies for intervener status. Metro states that it is a "middle-man" in this dispute, in that if Metro is found in breach of its collective agreement with Local 27 and damages flow out of that breach, Metro will deduct the value of those damages from its contract price with Bemar. Metro accordingly agrees that Bemar has a financial interest in these proceedings. The applicant, on the other hand, strenuously opposes the request by the companies to intervene. Counsel for Local 27 states that the applicant has no dispute with Bemar or with Framing Design. The grievance is against Metro, alleging that Metro has breached its collective agreement with Local 27. Metro is not the "middle-man", but the very target of the grievance. How Metro chooses to pay its damages, if awarded, is of no interest to Local 27. Counsel states that over the years, the Board has consistently refused to grant intervener status to other sub-contractors in similar situations, on the basis that mere commercial interest in a matter is insufficient. Counsel referred us to the following cases, *Ontario Hydro*, [1986] OLRB Rep. May 663; *C.U.P.E. v. Canadian Broadcasting Corp.*, (1990) 70 D.L.R. (4th) 175 (O.C.A.) and *International Alliance of Theatrical Stage Employees v. Canadian Union of Public Employees et al.*, Supreme Court of Canada, File No. 22061, dated May 21, 1992 as yet unreported. Counsel submits that these last two decisions are distinguishable from this case.

8. We agree with the applicant. In our oral ruling we stated that we considered the issue of the standing of the two companies in this proceeding to be one that involves the Board's exercise of its discretion. Here, the financial interests of these two companies are affected only if the Board

finds Metro to be in violation of its agreement with Local 27, if damages are ordered to be paid by Metro to Local 27, and if Metro chooses to recover these damages from monies that it would have paid to Bemar under its contract with Bemar. The relationship between Metro and Bemar, and the rights of Metro to recover its damages from Bemar, are not issues which arise under this grievance or under the collective agreement between Metro and Local 27. Rather, these issues are governed by the terms of a separate contractual relationship, and the Board does not have jurisdiction to determine the extent of those rights.

9. We adopt the analysis of the Board in *Ontario Hydro, supra*, which considered the request of a sub-contractor to intervene in a section 126 [then section 124] proceeding. In that case, counsel for the proposed intervener also relied on the potential for significant commercial prejudice as the basis for its request to intervene in the hearing. The Board in that case stated that there may well be cases under section 126 where persons other than parties signatory to a collective agreement will have the right to participate in an arbitration thereunder if they are bound by the agreement and their own rights are directly in question and may be determined by the arbitration. (See paragraph 20.) In other cases, however, the question of a person's standing requires the exercise of the Board's discretion. The Board in *Ontario Hydro* declined to exercise its discretion in favour of granting standing where the rights of the proposed intervener arose, not under the collective agreement which was the subject of the grievance, but under its own contract with Ontario Hydro, the respondent. The Board identified a concern for expedition in the context of section 126 hearings:

...

24. Proceedings before this Board under section 124 [now 126] were intended by the Legislature to be an analogue of the private arbitration process which section 44 [now 45] of the Act requires be provided for in each collective agreement as the final mechanism for resolving disputes over its interpretation, application, administration or alleged violation. This arbitration process is intended to be private and expeditious. The concern for expedition is particularly reflected in the prompt hearing requirements of section 124. The need for expedition will ordinarily militate against permitting intervention by a third party not entitled to participate as of right. Common sense suggests, and experience confirms, that the time consumed in hearing a matter will increase if the number of participants increases, because the mechanics of conducting and even scheduling the hearing become more complex. The essential nature of grievance arbitration as a private system for dispute resolution also militates against permitting intervention by a third party not entitled to participate as of right.

10. Counsel for the applicant referred the Board to the decisions of the Ontario Court of Appeal and the Supreme Court of Canada cited in paragraph 7 above, since they are recent and touch on the issues before us. Those decisions are consistent with our findings, as they dealt primarily with the question of *notice* as opposed to standing *per se*. In particular, we do not view the Supreme Court of Canada decision as requiring this Board to open its proceedings under section 126 to a party whose interests in a proceeding arise out of its rights under a separate contractual relationship with the respondent, over which this Board has no jurisdiction. The principles of *Ontario Hydro*, in our view, still apply.

11. The letter from Bemar, dated June 30, 1992, requesting reconsideration of our decision in this matter reads:

Having received and reviewed the Board's Decision dated June 10, 1992, in the above matter, please be advised of the following:

1. Bemar formally notifies the Board that it hereby appeals the Decision.

2. Bemar requests immediate written confirmation from the Board of receipt and acknowledgment of this notice.
3. Bemar hereby requests a Board order adjourning the above matter until this appeal has been processed and a reconsideration of the Decision ordered.

Should you have any questions, please do not hesitate to contact writer at (416) 795-0160.

12. As stated above, the Board will treat this letter as a request for reconsideration. The Board directs Bemar to provide written submissions as to why our decision in this matter ought to be amended or revoked. These submissions shall be delivered to the Board no later than 5 p.m., Friday, July 17, 1992. The continuation of the hearing in this matter shall proceed on the date scheduled, July 14, 1992.

0539-92-U Bruce Reilly, Complainant v. The United Steelworkers of America, Respondent v. GSW Inc., Intervener

Discharge - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration

BEFORE: *S. Liang*, Vice-Chair.

APPEARANCES: *C. Forster* for the complainant and *Bruce Reilly*, the complainant; *Brian Shell* and *Winston Curtis* for the respondent; *David Hager*, *Roger D. J. Lippert* and *Brent McPherson* for the intervener.

DECISION OF THE BOARD; July 8, 1992

1. This is a complaint made pursuant to the provisions of section 69 of the *Labour Relations Act*, which reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complainant, Bruce Reilly, was discharged from employment with the company on or about September 12, 1990. On February 19, 1991, counsel for Mr. Reilly wrote to the union requesting that it provide him with information as to how a grievance procedure is instituted. On February 22, the union filed a grievance on behalf of Mr. Reilly alleging that he was discharged contrary to the provisions of the collective agreement. The union held a membership meeting on May 14, at which time it was decided not to proceed to arbitration on Mr. Reilly's grievance. Mr. Reilly was not present at this meeting, and was apparently unaware of it. There is a series of letters

between counsel for Mr. Reilly and counsel for the union between the time Mr. Reilly's counsel becomes aware of the union's decision, shortly after May 14, and April 28, 1992. On October 31, 1991, the union wrote to the company requesting that the grievance be referred to arbitration, despite the time lapse, a request which the company refuses. Mr. Reilly's counsel is informed of this by letter from counsel for the union dated February 13, 1991. In a letter of April 28, 1992, the union repeats its earlier position that it acted in accordance with its duty to fairly represent Mr. Reilly.

3. This complaint was filed with the Board on May 7, 1992. The particulars of the complaint are as follows:

- 4(a) The Complainant, Bruce Reilly, who is also the Grievor herein, was an employee of his employer, General Steel Wares of Fergus, Ontario, from on or about September 25th, 1986, to the date of his dismissal on September 12th, 1990.
- (b) During Mr. Reilly's period of employment with GSW, he was included in a collective agreement between GSW Water Heating Company and GSW Pump Company, as employer, and the United Steelworkers of America, Local 3789. The collective agreement, effective from August 1st, 1990 to July 31, 1993, was the agreement in effect at the time of Mr. Reilly's dismissal on September 12, 1990.
- (c) The Complainant states that the union acted in a manner that was arbitrary, discriminatory and in bad faith when it represented him at a grievance hearing in regard to his dismissal.
- (d) The Complainant states that as a result of declining mental health, for which he had received no treatment or firm diagnosis, he became insubordinate at work, and his conduct at home and in his personal life became irrational. He was convicted of impaired driving and driving while disqualified on September 10th, 1990, and the presiding judge sentenced him to ninety days, with an order that he would be immediately released on the temporary absence program.
- (e) On September 12th, 1990, an Official of the Wellington Detention Centre called Mr. Reilly's employer, GSW, to confirm his employment and they stated that there was no work for him and that he had been dismissed from his employment. Accordingly, Mr. Reilly was not released to attend his employment, and in fact was only released November 23rd, 1990 and he immediately was admitted to the Homewood Sanitarium where he received treatment for severe mental disability, which was subsequently diagnosed as paranoid schizophrenia. He was treated and continues to be treated with medication which helps to control his schizophrenia, and would have been employable sometime in 1990, subject to his physician's opinion.
- (f) His employer refused to consider the reinstatement in his employment, and refused his counsel's request to make application for disability benefits, which must be done through the employer.
- (g) On or about May 15th, 1991, Mr. Reilly's counsel contacted both GSW and the local union representative, Robert Pringle, with respect to Mr. Reilly's illness and disability, and he was advised by Mr. Pringle that the grievance had been filed for Mr. Reilly by the union, that a grievance meeting had been held, and that it was dismissed because Mr. Reilly did not attend. Mr. Reilly states he was never notified of the meeting.
- (h) To date, Mr. Reilly does not have any specific details of this grievance meeting, but takes the position that none of the supporting medical documentation with respect to his mental illness (paranoid schizophrenia) was before the parties for their consideration at the grievance meeting.
- (i) The Complainant states that this medical documentation supports his claim for a men-

tal disability, and since the union did not present this information to the employer at the grievance meeting, the union was acting unreasonably and arbitrarily in not making a proper presentation on the merits, and was and is discriminating against Mr. Reilly because of his mental illness in not pursuing this grievance.

- (j) To the date hereof, neither the union nor the employer have agreed to re-open the matter to have this grievance heard on its merits and both union and employer have refused to provide specific information with respect to the nature of the grievance hearing that was held.

4. A hearing into the complaint was set for June 18, 1992. On June 12, the respondent, through its General Counsel, wrote to the Board as follows:

I acknowledge receipt of a copy of the complaint filed pursuant to section 91 of the Act alleging that my client, the United Steelworkers of America, has violated section 69 of the Act.

This letter constitutes our Reply to the complaint. I write to advise that the respondent admits that it violated section 69 of the Act by failing to ensure that the complainant was adequately notified of the membership meeting at which his grievance, alleging unjust discharge, was considered by the local union membership and by failing to advise the membership of arguably relevant medical information.

In view of the respondent's admission, the only issue which remains for determination by the Board is the question of the remedy which the Board should order in favour of the complainant.

The respondent shall request that the Board determine whether or not the complainant/ grievor was/is medically fit to perform his job at any time between the prolonged absence from employment due to his incarceration and the date of the filing of the instant complaint. The respondent is of the view that if, in fact the complainant/grievor was not capable of returning to employment on account of his medical condition there is no purpose to be served in directing that the matter be dealt with by an arbitrator.

In the alternative, the respondent shall request that the Board direct that Mr. Reilly's grievance be referred to an arbitrator selected in accordance with the collective agreement between the respondent and GSW Inc., the complainant's employer by not later than June 23, 1992. In our submission it is appropriate for that arbitrator to determine what compensation, if any, should be paid to the grievor in the event the grievance is upheld.

However, with respect to the allocation of compensation between the company and the union, we submit that that is a matter for determination by the OLRB. Rather than dealing with that issue at this time, the respondent submits that it is appropriate for the question of allocation, if applicable, to be a matter to be dealt with by the Board following the determination by the arbitrator. That issue flows from the Board's jurisdiction pursuant to s.69 of the Act. In this way the parties, including the complainant, will not be put to the expense of litigating the allocation issue until it is clear that the issue requires resolution.

5. At the hearing, it became apparent that the parties are in agreement that Mr. Reilly's grievance be submitted for arbitration. The parties have also agreed that the Board shall remain seized on the issue of the liability of the union for any portion of damages which may be awarded to Mr. Reilly as a result of the arbitration decision. In connection with the arbitration, Mr. Reilly has requested the following:

- (a) that Mr. Reilly have carriage with respect to that portion of the grievance as it singularly affects his interests. In this respect, Mr. Reilly acknowledges that there may be issues under this grievance of broader interest to the union's membership, such as interpretation of contract language, on which the union ought to retain carriage;
- (b) that the union pay for the costs of Mr. Reilly's counsel at the arbitration, to a reasonable limit;

- (c) that an arbitrator be selected only with the prior approval of Mr. Reilly's counsel and failing agreement, that the parties will request the Minister of Labour to appoint an arbitrator;
- and
- (d) that Mr. Reilly be given the opportunity to make any preliminary motions he deems appropriate at the hearing of his grievance.

6. A further issue arose during the course of argument. Counsel for the company states that although it has agreed that the grievance be referred to arbitration, it does not agree to waive any defences or preliminary objections that it may wish to make based on the grievor's (alleged) failure to grieve within the appropriate time limits. In other words, counsel accepts that the agreement to refer the matter to arbitration is an agreement to waive any potential objections to timeliness based on the time which has lapsed as a result of the union's violation of the Act. However, the company states that even *before* the events which the union concedes constitute a violation of the Act, the company had raised a timeliness objection under the collective agreement. We were referred to a copy of the grievance filed by the union on Mr. Reilly's behalf on February 22, 1991. On the back of this grievance is written the response of the company, dated March 28, which states:

The grievance was filed after the time limits specified in the Collective Agreement and, for this reason, must be denied. Without prejudice or precedent, however, the Company also finds that Mr. Reilly was properly discharged for cause. He failed to respond to numerous progressive disciplinary measure and, once again, had a further incidence of lengthy absence. Grievance denied.

7. The union opposes the position of the company on this, preferring that the Board order the matter referred to arbitration on its merits. Counsel for Mr. Reilly did not dispute the position taken by the company, and indicated simply that the medical evidence as to Mr. Reilly's mental condition after September 12, 1990 would be relevant to this issue.

8. On the other issues, counsel for Mr. Reilly argues that there is a clear potential for conflict of interest where the same lawyer represents the interests of Mr. Reilly and the union at the arbitration. Since the union may be liable at the end of the day for a portion of the damages awarded if Mr. Reilly's grievance succeeds, the interests of the grievor and the union conflict and one lawyer cannot properly represent both of these parties. Counsel also argues that the facts can only be fully presented if Mr. Reilly has an active, instructing role with respect to the arbitration. Mr. Reilly also requests that the Board order the union to pay the reasonable costs of his counsel. As well, Mr. Reilly requests an order that the union will select an arbitrator only with the approval of Mr. Reilly's counsel. Failing agreement, the parties may request the Minister of Labour to appoint an arbitrator. Finally, Mr. Reilly's counsel requested an order that Mr. Reilly be permitted to make preliminary motions at the hearing of the arbitration. Counsel relies on *Michael Kiss*, [Board File No. 3375-90-U], October 24, 1991, a recent unreported decision of this Board.

9. Counsel for the union states that the arbitration of Mr. Reilly's grievance will involve issues of broader concern to the union membership. For instance, the collective agreement contains the following clause:

8:04 Any employee whom the Company suspends or discharges, or whom it contends has lost their seniority under Article 14, shall be retained at/or returned to active work until any grievance contesting such suspension, discharge or break in service question is finally resolved through the grievance and arbitration procedure.

10. Mr. Reilly has not to date been returned to work. Thus, there is an issue as to the appli-

cability and interpretation of Article 8.04, which the union states has never been interpreted by an arbitrator. Further, counsel states that there may be a dispute between the company and the union as to the company's obligations to provide for a disability plan. This issue may arise because it appears that for at least part of the period between his dismissal and the date of this hearing, Mr. Reilly was suffering from a mental disorder. Thus, it is argued, there may be an issue as to the company's obligation to provide disability benefits to Mr. Reilly during the period in which he would have been unable to work.

11. Counsel for the union submits that where there is no issue of bad faith in the union's conduct towards a complainant, the Board should not disturb the normal relationship between a union and its members by ordering that a complainant have carriage of his own grievance. The Board was referred to *John Glykis*, [1985] OLRB Rep. March 420; and the cases cited therein. A union's role with respect to the arbitration ought not to be ousted unless there are extraordinary circumstances demonstrating that the union is incapable of fulfilling this role. Counsel states that the union has no objection to Mr. Reilly's counsel attending at the hearing, and will consult with him and seek his assistance. However, on the facts of this case, it would not be appropriate to direct that the control of the arbitration process be removed from the union. It is submitted that a breach of section 69 does not in itself mean that a union is incapable of carrying out its normal role. It was put to the Board that there has not been a single case in over ten years where this particular union has been found in violation of the duty under section 69.

12. The union also opposes the request of Mr. Reilly to have some say in the selection of an arbitrator. It is submitted that this affects the integrity of the relationship between the union and the employer, who have negotiated a provision into the collective agreement providing for the procedure of such selection.

13. Counsel for the company essentially adopts the position of the union on the above matters. As referred to earlier, the company also takes the position that although it agrees that Mr. Reilly's discharge grievance ought to go to arbitration, it also intends to rely on any defences of timeliness that it would have had irrespective of the union's breach of the Act.

Decision of the Board

14. In *John Glykis*, supra, the Board considered a request for an order allowing a complainant in a section 69 proceeding to retain his own counsel in the subsequent arbitration of his grievance. There, the Board stated:

9. ... Nothing in the evidence suggests any malice or ill will towards the complainant by officials of the union. The wrongdoing attributed to the union stemmed from "gross negligence". On the contrary, as indicated in paragraph 3 of the Board's decision, the complainant has received the union's assistance without complaint on many previous occasions. The assistance rendered by the respondent following the complainant's termination in October of 1983, though falling below the standard required by section 68, was not tinged in any way by bad faith or active opposition to the grievor himself. I am not prepared, in the circumstances, to assume that the union will not provide proper representation to the grievor should the matter proceed to arbitration. This is consistent with the Board's jurisprudence. The Board stated in *Phillip Wayne Bradley*, [1983] OLRB Rep. June 865, at paragraph 3:

... Where the Board does grant such remedy [arbitration], it does not always make an order as to representation at such arbitration. The Board has normally specified who must represent the grievor at an arbitration it directs, as a result of a section 68 proceeding, where there are ongoing, serious concerns that the complainant will not receive a non-arbitrary, non-discriminatory, good faith treatment by the [union] in the course of its presentation of the arbitration (see, for example, *Leonard Murphy*, [1977] OLRB Rep. March 146, the first reported decision where such an order is

made). When the Board has made an order concerning representation at arbitration, the nature of the order has been that the union and the grievor *jointly* select a lawyer to handle their presentation (see *Leonard Murphy, supra*; *Bedard Girard, supra*).... An order for separate, independently selected legal counsel would be highly extraordinary. A remedy under section 68 should not change the essential character of the arbitration process. The respondent [union] is the party to the collective agreement and the arbitration not the grievor (*General Motors of Canada v. Brunet*, [1977] 2 S.C.R. 537) and would have, except for a violation of section 68, had exclusive selection over whether the arbitration was to proceed and how. The interests of a bargaining agent and the grievor are united before an arbitration board. Jointly selected counsel has been ordered only where the Board feels there would be no truly united representation of the arbitration case for the respondent and the grievor. The joint selection process is to ensure that this unity is restored. The exclusive selection of legal counsel would effectively remove the essential unity of the grievor's and union's interests at arbitration.

If indeed the union fails to comply with its duty of fair representation at the arbitration stage, it will expose itself to another complaint before the Board, and the complaint, if proven, will be remedied.

15. In the above case, there did not appear to be any potential for apportionment of the grievor's damages between the employer and the union, assuming success at the arbitration. However, in two subsequent Board cases where a union was found in violation of section 69, *Jean Liebman*, [1986] OLRB Rep. June 753 and *Jeanne St. Pierre*, [1986] OLRB Rep. June 883, the Board ordered an apportionment of the damages arising out of the arbitration, if any, between the employer and the union. In *Jean Liebman*, the Board declined the complainant's request for an order entitling her to representation by counsel of her choice at arbitration. However, the Board found it appropriate to make an order directing the union to retain counsel jointly selected by it and the complainant. In *Jeanne St. Pierre*, in the context of a similar request from the complainant, the Board specifically directed its mind to the issue of conflict of interest, stating:

23. Because the union may be liable to pay compensation if the grievance succeeds at arbitration, the union's full-time employed representatives would have a conflict of interest in representing the complainant's interests at arbitration. Accordingly, the respondent union will be required to retain counsel jointly selected by it and Ms. St. Pierre to act in the union's name and at the union's expense to represent her interests at the arbitration of the grievance: see *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215 at 17 and *Central Stampings Limited*, [1984] OLRB Rep. Oct. 1383 at 8.

16. Interestingly, despite the Board's comments with respect to conflict of interest, in neither case (decided by the same Vice-Chair) did the Board direct that the grievor be given sole carriage with respect to the arbitration. In fact, in addressing the possibility of settlement, the Board stated in *Jean Liebman* that the union was entitled to settle the grievance without the grievor's consent. The Board required the union not to agree to any settlement, without first advising the complainant of the proposed terms and affording her or her representative an opportunity to discuss them with those who would make the union's decision as to whether to agree to the settlement.

17. In the view of this Vice-Chair, the approach taken in those two decisions reflects an equitable balance of the interests of the complainant and of the union in these situations. Without a doubt, there is at least the appearance of conflict where a representative in a legal proceeding represents two parties whose financial interests collide. For this reason, allowing a complainant a say in choosing this representative serves to enhance the legitimacy and integrity of the process. On the other hand, there are several reasons why it is not appropriate, unless there are exceptional circumstances, to remove carriage of the grievance from the union's hands. A union bears the authority and responsibility to deal with employment-related issues relating to those employees whom it represents. This responsibility includes taking matters to management on behalf of these

employees, and it also includes the duty to balance the interests of the employees within the unit. There are times when the union must choose between the conflicting interests of various employees, or groups of employees. These choices are part of the responsibility of the union. The union, in the normal course, retains the ability to have the final say on grievances, since it has a responsibility to *all* of the employees whom it represents, not just the grievor.

18. As well, the significance of a conflict as it relates to the damages that this complainant may eventually be awarded, must be assessed in light of the nature of the relationships here. This union will, for the foreseeable future, continue to be the bargaining agent for the employees at General Steel Wares. It has an interest in maintaining this relationship. To this extent, it therefore has an interest in representing the employees fairly and competently and in being seen to do so. This interest extends beyond the particularities of Mr. Reilly's particular situation, and is a long-term interest. Furthermore, it is important to remember that the union has a continuing *statutory obligation* to Mr. Reilly, under section 69.

19. In light of these considerations, the Board will not normally take away from the union its normal role with respect to the arbitration of the complainant's grievance, even where there is a conflict because of the union's potential liability for a portion of the complainant's damages. The apparent conflict is of much less significance because of the existence of these other surrounding circumstances, than it might be in another context. In the result, the Board declines the complainant's request to have sole carriage and independent legal counsel with respect to his discharge grievance, or a portion of his grievance.

20. With respect to the appointment of an arbitrator, the Board appreciates the union's position with respect to the normal process of selecting an arbitrator which has been negotiated between the union and the company. However, this arbitration does not arise out of the normal process. Giving the complainant some say in the selection of an arbitrator is a reasonable measure which will help to ensure the legitimacy of the process in the complainant's perception, without unduly interfering with the union's interests.

21. Finally, as stated above, the company requests that the Board recognize its right to rely on defences to the grievance arising prior to the events which the union admits constitute violations of the Act. The logic of this position is difficult to dispute. To the extent that the complaint is about a union meeting on May 14 and accompanying decision to withdraw the grievance, the goal of the Board's remedies is to put the grievor back to the position he would have been in but for the union's breach of the Act. As of May 14, the company had already signalled its intention to raise a timeliness objection to the grievance. The timeliness of the grievance is an issue which would have been raised at the arbitration hearing even if the decision made by the union on May 14 had been to refer the matter to arbitration. Thus, the Board will not preclude the company from relying on it. The question of timeliness, and whether there are grounds to relieve against time limits, is a question which should be put before an arbitrator, and not decided by this Board in the context of this complaint. Considering the apparent condition of the complainant at the time in question however, the company may even consider whether all parties may be better served by having the grievance dealt with on its merits.

22. In sum, the Board declares that the respondent union acted in violation of section 69 of the Act, and accordingly directs that:

- (a) the union forthwith submit the complainant's grievance to arbitration under the applicable collection agreement;

- (b) the company shall not raise any objection based on delay other than the objection it raised prior to May 14, 1991;
- (c) the company, the union and the complainant will mutually agree upon a single arbitrator. Should the parties fail to agree upon an arbitrator within a reasonable period, the Minister of Labour for the Province of Ontario shall appoint the arbitrator;
- (d) the union and the complainant shall jointly select counsel to act for them on the arbitration of the grievance;
- (e) the complainant's personal counsel, if any, will be entitled to be present at the arbitration.

23. The Board remains seized of this matter to resolve any disputes arising over the interpretation or implementation of these directions.

3156-89-R; 3157-89-R Service Employees' International Union, Local 532, Applicant v. Saint Elizabeth Home Society, Ontario Ministry of Health and Hamilton Jewish Home for the Aged Charitable Foundation operating as Shalom Village South, Respondents

Crown Transfer - Ministry of Health revoking licence and taking control of 184 bed nursing home - Ministry operating home for over 3 years - Parties agreeing that home becoming Crown undertaking - Ministry inviting proposals for the 184 beds and subsequently awarding the 184 beds to 3 licensees, including "SV" - "SV" committing itself to receiving a number of residents of nursing home and to considering nursing home staff for employment - Board finding and declaring a transfer of part of an undertaking to "SV" within meaning of *Crown Transfers Act* - Board remaining seized with respect to other relief

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Dana Randall*, *Livio Piersanti* and *Emery Baldry* for the applicant; *Maureen Farson*, *Cindy Biondi* and *Astrida Plorins* for the Ministry of Health; *Richard H. Shekter* and *Sheila Burman* for Shalom Village.

DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; July 10, 1992

1. The name of the respondent Shalom Village is amended to read: "Hamilton Jewish Home for the Aged Charitable Foundation operating as Shalom Village South".

2. These matters are applications under section 64 [formerly section 63] and 1(4) of the *Labour Relations Act* and an application under the *Successor Rights (Crown Transfers) Act* ("the *Crown Transfers Act*") with respect to a series of events which took place between 1987 and 1990. By a letter dated April 24, 1990 counsel for the Saint Elizabeth Home Society advised that his cli-

ent would not be participating in the proceedings. On the first day of hearing the applicant also withdrew its claim under section 1(4) of the *Labour Relations Act*.

3. At the time of these events, the Saint Elizabeth Nursing Home ("SENH") was a 184 bed nursing home located in Hamilton. During the winter and spring of 1987, it became apparent that the home was in serious difficulties with respect to the care provided to its residents. A number of attempts by the Ministry of Health ("the Ministry") to bring these difficulties to the attention of the Saint Elizabeth Home Society ("the Society") which operated the home met with little success. As a result, by August of 1987, the Ministry had decided to revoke the license of SENH and take control of the facility pursuant to the *Health Facilities Special Orders Act*, 1983, c. 43 as amended. That Act provides in part as follows:

6. The Minister may propose to revoke the license for a health facility where,

(a) the physical state of the health facility is causing or is likely to cause harm to or an adverse effect on the health of any person or impairment of the safety of any person and it is not practicable to correct the physical state of the health facility;

(b) the manner of operation of the health facility is causing or is likely to cause harm to or an adverse effect on the health of any person or impairment of the safety of any person and it is not practicable to correct the manner of operation of the health facility; or

(c) the conduct of the licensee or, where the licensee is a corporation, of the corporation or an officer or director of the corporation affords reasonable grounds for belief that the health facility is not being or is not likely to be operated with competence, honesty, integrity and concern for the health and safety of persons served by the health facility.

7.-(1) Where the licence for a health facility is suspended under this Act and the Minister is of the opinion that the health facility should continue in operation in order to provide temporarily for the health and safety of persons in the community served by the health facility, the Minister by written order may take control of and operate the health facility for a period not exceeding six months.

4. Ron Sapsford, Director of the Nursing Homes Branch in the Ministry, was appointed as the Minister's representative to manage and operate the nursing home. Mr. Sapsford in turn appointed Emery Baldry, one of his staff with extensive experience as a nursing home administrator, to be the administrator of SENH. The intention of the Ministry initially was to "get in and out" as soon as possible, because it did not wish to run the home on a permanent basis. As it turned out, the Ministry operated the home for over three years, until January of 1991.

5. On the day on which the Ministry entered the premises and took control, Mr. Baldry called employees together and informed them of the takeover. He advised them that they had the option of either working for the Ministry at SENH or continuing to work for the Society, presumably somewhere other than in the home. All the staff opted to remain at the home and work for the Ministry.

6. Most of these employees were represented by the applicant union. Either on the day of the takeover or shortly thereafter, Livio Piersanti, a staff representative for the applicant, contacted Mr. Baldry to obtain more information. His main concern at that point was that SENH might close immediately. Mr. Baldry assured him that the home would continue to operate and that employees would be retained, at least for the short term.

7. On August 13th, the Society notified the Ministry that it would not be appealing the

revocation of its license. However, the Society also indicated that it would not grant any extensions after the six month period the Ministry was permitted under the Act to remain in the Home. Sister Elizabeth Manhertz, the President of the Society, informed the Ministry that it would have to transfer the residents to a new location no later than February 6, 1988, as the Society would require the return of the premises.

8. At this point, Mr. Sapsford and Mr. Baldry testified, the Ministry considered that it had several options, including operating the home as a going concern until replacement facilities were built, closing the home and transferring the residents to other homes, or winding down the operation gradually until the home was vacated by attrition. There were a number of disadvantages to the latter two courses of action. The Hamilton-Wentworth area had an acute demand for nursing home beds which was not being met. As a result, the Ministry did not want to take the SENH beds out of service, even temporarily. Moreover, it did not want to move a frail resident population twice, that is, first to some other facility and subsequently to the replacement homes when construction was completed. In addition, although the Ministry might have been able to transfer a number of the residents to other homes on an "overbedding" basis, which involves temporarily increasing the number of beds beyond that in their licenses, the capacity to overbed in the area was already saturated. As a result, the Ministry would still have to care for a number of residents at the SENH premises in any event. Moreover, such transfers would create host of inequities for those on the waiting list for nursing home beds in the area. As a result, the Ministry decided to operate the home as a going concern and to lease the premises from the Society until the new facilities were built.

9. On August 18th, the Minister wrote to Sister Elizabeth to the effect that if he heard nothing by August 25th, he would be relying on her statement that the Society was not appealing the revocation of the license. At that point, he indicated, a request for proposals to build new facilities to replace the SENH beds in the Hamilton-Wentworth area would be issued. He also asked her to reconsider her position with respect to regaining possession of the premises, and stated that the Ministry wished to negotiate a lease at fair market value for a sufficient period of time to allow for the construction of the new nursing homes and the orderly transfer of residents to those new facilities. Eventually, the Ministry was able to negotiate not only a lease with the Society, but several extensions to that lease which were necessitated by the fact that completion of the new facilities was delayed by a number of problems beyond their control.

10. The Ministry immediately hired more employees, almost doubling the existing staff complement. More specifically, between August 6th, 1987 and February 2nd, 1988, the Ministry recruited eighteen registered nursing staff, twenty-four health care aides, fourteen kitchen staff, three laundry staff, one secretary and one bookkeeper, two receptionists and two activity staff. It also increased housekeeping coverage from five days to seven days a week. Both the existing employees and the new employees were now paid by the Ministry. Mr. Baldry undertook a staff training program and engaged a nurse consultant both for this purpose and to develop policies and procedures for the home. In addition, the Ministry continued to admit new residents, and even increased the resident census until at one point it was closer to 200. New admissions were not closed until the beginning of 1990. The Ministry also bought over \$100,000 worth of new equipment for the home. Mr. Baldry had complete responsibility for its day-to-day operation including hiring, firing and disciplining staff, and entering into contracts for purchasing services and supplies, with the exception of major capital purchases which had to be approved by Mr. Sapsford. He also continued to fulfill other duties with the Ministry to some extent. In addition, he consulted regularly with Mr. Sapsford and with the Communications and Legal Branches of the Ministry on a variety of matters relating to the home.

11. During the period the Ministry operated SENH it treated itself as a licensee, although of course it did not actually issue a license to itself. According to Mr. Sapsford, the purpose of considering the Ministry to be the licensee was to put a framework around the Ministry's presence. One example of this approach is that when the resident population rose above 184 beds, the Ministry issued itself written permission to overbed in the same manner it might do for another licensee. In addition, the licensee concept was used because the Ministry wanted its inspection staff to treat SENH like any other home.

12. Sometime in August of 1987, the applicant union gave the Ministry notice to bargain, since its then current collective agreement expired on November 17th, 1987. On August 19th, Mr. Baldry met with Mr. Sapsford to discuss a number of topics including arrangements for negotiations with the union, the job security of employees and whether or not the Ministry would help the latter to relocate. Mr. Sapsford told Mr. Baldry to make arrangements for negotiations and to consult with the Legal Branch in this regard. He also said that the Ministry would help staff to relocate, which Mr. Baldry understood to mean relocating to the replacement facilities. As a result, Mr. Baldry advised employees that the Ministry's position was that it would help them to relocate to the replacement facilities that emerged from the request for proposals. Mr. Sapsford and Mr. Baldry also discussed whether employees had become civil servants as a result of the takeover, and they decided not to raise this with employees, but rather to "deal in good faith" with the applicant union. Throughout the fall, Mr. Baldry and Mr. Piersanti had regular contact on a weekly basis.

13. On September 11th, the Ministry issued a news release announcing a request for proposals which included the following paragraphs:

The Ministry of Health is calling for proposals for the operation of 184 nursing home beds in Hamilton-Wentworth to replace the beds now located at St. Elizabeth Nursing Home in Hamilton, Health Minister Murray Elston announced today.

"The Health Ministry and St. Elizabeth Home Society are negotiating the use of St. Elizabeth Nursing Home beyond the six-month period of the order," Mr. Elston said. "This will allow successful applicants time to build additional space for the new nursing home beds."

Construction is expected to be completed in September of 1989.

"The Ministry and St. Elizabeth Home Society have agreed that the continued use of St. Elizabeth Nursing Home until residents can be moved to the new accommodations will serve the best interests of the residents," Mr. Elston said.

14. The Ministry then placed advertisements in the local papers on October 1st, 1987, inviting requests for proposals for the 184 beds. The advertisements also announced that perspective proposers could obtain further information and any clarification at a public meeting on October 13th at the Royal Connaught Hotel, and that written instructions and copies of a detailed request for proposals document were available from the Ministry. Among other things, that package of material indicates that the successful proposer is selected from among the applicants, and that all written and oral representations are carefully considered in this regard.

15. The request for proposals process was used by the Ministry because the Society had chosen not to appeal the revocation of its license and thus there was no commercial transaction with a purchaser at the end of it. As a result, the request for proposals process, which is normally used for distributing newly created licensed beds, was the only route available to the Ministry to issue licenses to replacement facilities and yet maintain the existing beds in the area. Only twice before in the history of the legislation had the Ministry taken control of homes, and in both of

those cases it had been able to transfer residents to other facilities within a number of weeks. As a result, this was a unique situation, according to Astrida Plorins, an official with the Nursing Homes Branch of the Ministry at the time in question. Some elements of the usual request for proposals process such as the time frames were modified to reflect both the fact that the Ministry was dealing with pre-existing, rather than newly created beds and the Ministry's concern that it not be required to operate SENH for any longer than was necessary.

16. On October 13th, a public meeting for the request for proposals was held at the Royal Connaught Hotel. According to Mr. Sapsford, he chose Mr. Baldry to chair the meeting and told him to raise two specific points in addition to the usual information provided at such a meeting: first, that the Ministry expected the successful proposers to take the SENH residents, and secondly, that it expected them to consider hiring the SENH employees.

17. We heard considerable evidence with respect to what actually occurred at that meeting and what was said in this regard. In cross-examination, it became apparent that the differences between the various witnesses' recollection of the meeting were somewhat less than it first appeared. In any event, we prefer the account given by Eric McGinniss, a reporter for the Hamilton Spectator present at the meeting for several reasons. In the first place, all parties agreed in final argument that they could "live with" his evidence. Secondly, he had no legal interest in these proceedings or in the events involved. Thirdly, he has been involved in the newspaper business for approximately twenty years, and his purpose for being at the meeting was to accurately report on it, a purpose for which he has considerable training and experience. Finally, he took notes of what was said at the meeting in his capacity as a reporter.

18. Mr. McGinniss told the Board that during the question and answer period following Mr. Baldry's initial speech, Mr. Baldry said to the meeting that the license would likely be split among two or more applicants, with non-profit community groups getting preference. He also told those attending that the successful applicant or applicants would have to take the residents of SENH. Mr. McGinniss quoted Mr. Baldry as follows:

You won't have an option about that. Your first clients will be from St. Elizabeth. We will also look to you to look at staff presently employed at St. Elizabeth. There are very good staff there, we intend to give them very good training and they would be excellent candidates for you to consider as staff.

19. Mr. Baldry then said to the meeting that there were many staff who would like to transfer with the residents, and that they knew the residents and would be familiar with caring for them. One questioner referred to the fact that there was a union at SENH and another asked if that was a factor that the Ministry would consider in the proposals. Mr. Baldry replied that it was a factor that they would inject at the time the Ministry entered into a letter of understanding, and that it would be a condition of the license award.

20. The deadline for proposals was November 17th, 1987. On November 16th, 1987, the Hamilton Jewish Home for the Aged Charitable Foundation operating as Shalom Village South ("Shalom Village") filed a proposal for 80 beds. Shalom Village is a charitable organization which has operated a senior citizens' residence since 1981. This is an apartment complex designed to meet the needs of the frail elderly, which provides support services such as a dining room, recreational space, some housekeeping and home-making services, and some personal care. The apartment complex is oriented towards the needs of the Jewish community, and has a kosher kitchen.

21. At the time that the apartment complex was built, the Board of Directors for Shalom Village contemplated the possibility of adding a Jewish community centre and a nursing home at

some point in the future. By 1987, the population of the apartment complex had become more elderly and residents were requiring a greater degree of medical care. In addition, there was a growing need within the Jewish community for nursing home beds. As a result, the Board of Directors decided to build a nursing home adjacent to the apartment complex. With this in mind, Shalom Village had previously filed a proposal in May of 1987 for 60 beds. This first proposal was submitted as part of a request for proposals process for newly created beds which were unrelated to SENH. At the time Shalom Village submitted its proposal with respect to the SENH beds, it had not yet been informed of whether it had been successful with respect to its first proposal. Ultimately, the first proposal was rejected. Shalom Village's new proposal, which was virtually identical to its previous one, emphasized a philosophy and design centering on a family/village atmosphere, the rehabilitation and independence of residents, a Jewish environment, and a special wing for Alzheimer's patients.

22. On January 14, 1988 there was a meeting to provide the public with an opportunity for comments on the various proposers and proposals filed. Interviews of seven proposers, including Shalom Village, took place on February 9th, 10th and 11th by an evaluation committee from the Ministry chaired by Ms. Plorins. Ms. Plorins testified that each of the proposers indicated at the interviews that they would be prepared to accept residents from SENH, and were willing to interview staff currently working there for positions at their respective proposed new facilities. After her testimony, a tape recording of the Shalom Village interview was produced by the Ministry which includes the following excerpt:

Sheila Burman [representative of Shalom Village]: The essential difference [between the first and second proposals] is that we have added, um, brought our funding up to date to what is now in place with the Ministry of Health and that has allowed us to increase the hours of nursing care over what we had before. We have also put an extra maintenance person half-time seven days a week into the facility and have included a full-time social worker if we're able to do that. At the moment, we have included a full-time social worker against part-time before, mostly because we felt if we're looking at St. Elizabeth that we're going to need more time in helping these people settle and so forth.

Astrida Plorins: You're quite prepared to accept people from Saint Elizabeth?

Doctor Ron Kaplan [representative of Shalom Village]: Our expectation is that's what we'd be doing. For sure. We look forward to it.

Shalom Village interpreted this exchange as referring only to residents, while the applicant appeared to suggest that it referred to both employees and residents.

23. In April, Ms. Plorins prepared a report to the Minister which evaluates the proposers, and which says as follows:

All of the proposers indicated at the interviews that they would be prepared to accept residents from St. Elizabeth and are willing to interview staff currently working at St. Elizabeth for positions at their respective proposed new facilities.

Shalom Village disputes that it made a commitment to interview SENH staff at that particular point in the process.

24. The Minister then awarded the 184 beds to three major proposers, which we will refer to as the new licensees. These new licensees were Shalom Village, which received sixty beds, Southrim Enterprises which was awarded sixty beds, and Heritage Green Seniors Centre which received fifty-three beds. Like Shalom Village, Southrim and Heritage Green were planning to construct new buildings. In addition, three other facilities received minor awards of between two

and five beds to expand the license capacity of their existing operations: Parkview Nursing Home received two beds, Hamilton Convalescent Centre received four beds and Victoria Nursing Home was awarded five beds. Mr. Baldry told the Board that the eleven beds that went to these other facilities did not have any conditions attached to them relating to residents or staff from SENH because these awards were intended to license existing excess capacity.

25. On May 5th, the Ministry of Health issued a news release which provided in part as follows:

The Hamilton Jewish Home for the Aged (Shalom Village), a non-profit senior citizens apartment complex, has received Ministry of Health approval to build a new addition to accommodate sixty nursing home beds.

The beds will replace some of the 184 St. Elizabeth Nursing Home beds, due to be closed soon.

26. On May 10th, the Ministry issued a news release with respect to the award to Southrim Enterprises. This release contained the following paragraph:

Today's awards plus sixty beds for Shalom Village announced last week and fifty-three for Heritage Green announced yesterday, complete the full complement of 184 beds to replace those being lost due to closing of the St. Elizabeth Nursing Home next year.

27. On May 20th, 1988 a letter advising Shalom Village of the award was sent from the Minister of Health. This included the following paragraphs:

It is understood that you have made certain written and oral representations herein referred to as the "proposal", and that these representations constitute part of the basis for my decision.

Before this award becomes final, you must agree to the following conditions:

A number of conditions are then set out, including a stipulation that the nursing home had to be ready for pre-licensing inspection on or before September 1st, 1989. There is no reference to any requirement to take residents or consider staff, although the applicant takes the position that this is covered by the reference to oral representations.

28. When the award letters to the three new licensees were drafted, Mr. Baldry was consulted as to their contents. He drew to the attention of the drafter that he thought it would be pertinent to include the conditions regarding the transfer of staff and residents. The drafter declined to do so and referred Mr. Baldry to Mr. Sapsford. Mr. Baldry then telephoned Mr. Sapsford and argued that those two conditions should be included. Mr. Sapsford was not persuaded. Mr. Baldry told the Board that Mr. Sapsford did not deny that those commitments had been made by the license recipients but rather that he seemed to think that it would be wiser not to try and deal with them in the award letter. Mr. Sapsford testified that the commitments with respect to taking the residents and considering the staff for employment were part of the reasons for the awards to the particular license recipients. However, they were omitted from the award letters because of the difficulty of quantifying the numbers involved at the time. It is fair to say, however, that there was some divergence of opinion between Mr. Baldry and Mr. Sapsford, with the latter being more sensitive to how the Ministry might be perceived in these circumstances. Mr. Baldry, who had the added pressure of attempting to hold on to sufficient staff at SENH until the home closed without a guarantee of subsequent employment was more concerned with this pragmatic problem and with his loyalty to SENH employees with whom he had greater contact.

29. Shortly before the award letters were issued, Mr. Baldry received a call from Sheila Burman, a representative of Shalom Village. She had been told that Shalom Village was one of the new licensees and she wished to know what to expect at that point in terms of the process. Mr. Baldry replied that she should expect an award letter that would be signed by the Minister, and that it would contain the conditions of the award. He then proceeded to indicate what he thought the conditions would be, including accepting staff and residents from SENH. Mr. Baldry was not sure whether his conversation with Mrs. Burman or Mr. Sapsford came first in time.

30. In the meantime, negotiations between the applicant and the Ministry with respect to a new collective agreement had been put on hold pending an interest arbitration award covering a number of nursing homes owned by Extendicare. That award was issued in April of 1988, and in a series of meetings between Mr. Piersanti and George Longo, a labour relations consultant hired to represent the Ministry, amendments were made to the SENH collective agreement to reflect the Extendicare award. During these negotiations, the union proposed that the following article be added to the collective agreement:

The Ministry of Health, when transferring the Nursing Home Licence of St. Elizabeth Nursing Home to the successful bidders, will guarantee succession rights within the meaning of section 63 of The *Labour Relations Act* and that the successful bidders will recognize Service Employees International Union, Local 532 as the exclusive bargaining agent of all the staff who will be transferred with the Licence and residents to the new Location.

In response to this, Mr. Longo told Mr. Piersanti that the Ministry, through Mr. Baldry, had verbally indicated that staff would be taken care of when the transfer of residents took place. He went on to say that the vendor could not grant succession rights in any event, since this was a matter for the purchaser to address. According to Mr. Baldry, there were a number of reasons for the Ministry's refusal to agree to this provision, including the fact that this issue was seen as one involving legislation which was the province of another Ministry.

31. At that point, the successor rights provision was the only article holding up the signing of a renewal collective agreement, and Mr. Piersanti was persuaded to withdraw his proposal. As a result, on June 7th, 1988 a collective agreement was signed between the Ministry and the applicant with a term running from November 17th, 1987 to August 5th, 1989. This term was not consistent with the Extendicare award, but rather with the lease extension that the Ministry had been able to negotiate with the Society.

32. After the award letters were issued, Mr. Baldry and Mr. Piersanti discussed the transfer of both staff and residents to the new homes which were to be built. This included some discussion with respect to dividing up the heavy and light care residents equally between the three new licensees. Because the senior employees would be more costly to an employer, Mr. Piersanti also indicated to Mr. Baldry that employees should be divided into three groups of senior, middle and junior staff and that each of the three new facilities should get some employees from each category. Mr. Baldry responded that it was premature at that point to discuss the matter as the new homes would not be ready for quite some time.

33. On May 18th, 1988 Emery Baldry wrote a memo to Mr. Sapsford as follows:

Following the announcements of the bed awards to Heritage Green, Shalom Village, and Southrim Enterprises, I have been busy reassuring residents and their families and especially staff of St. Elizabeth Nursing Home of our repeated commitments to them: the Ministry of Health will use its good offices to help each relocate at the replacement facilities. The process will involve extensive consultation, which will begin a few months in advance of planned openings, to ensure an orderly transition.

Moreover, I have reminded all concerned that the awards are conditional on acceptance of both our residents and our staff. I suggest a meeting at an early opportunity with all three proposers to examine how we might proceed collectively to minimize problems.

I suggest mid-June for such a meeting. Please advise.

Mr. Sapsford agreed, and a meeting was arranged for June of 1988.

34. In the meantime, Mr. Baldry sent a letter to the residents and their families which included these paragraphs:

You will know from recent press statements that Shalom Village, Heritage Green and Southrim Enterprises have been selected to build the new facilities which will eventually replace this nursing home. Each is known to be a fine operator. I am writing to let you know that it will likely take about one and a half years before these new homes will be ready to open.

Well in advance of their openings, however, the Ministry of Health will contact each resident and/or responsible party to begin making the necessary arrangements for everyone's relocation. Every effort will be made to honour individual relocation requests, although some may have to settle for their second choice.

Staff also will be relocating to the new homes. A similar process will be followed to assist in their transfer as well.

When we have a firm idea when the new buildings will in fact be ready to open, we will take the initiative to contact you (presumably about a year or so from now) to begin discussions on the prospective transfers. In the meantime, we will continue with our efforts to provide the best possible care. Your patience and understanding in this matter are appreciated.

35. The June meeting was attended by Mr. Sapsford, Mr. Baldry and representatives from the three new licensees. According to Mr. Baldry, before the meeting started there was some discussion of the wages being paid to staff at SENH. When Sheila Burman was told what those wages were and the fact that these were union rates, she was shocked at the amount. Although Mrs. Burman initially did not remember that there had been any reference to the union, she subsequently recalled this exchange, which was also confirmed by Leon Price, another representative of Shalom Village.

36. At the meeting, Mr. Sapsford emphasized to the new licensees the need to meet the deadlines for construction, as the Ministry did not wish to operate SENH for any longer than was necessary. Three or four months prior to the opening of the new homes, the Ministry would begin planning the transfer of residents, which would include soliciting their preferences as to which home they wished to move to. The three new licensees expressed concerns about equity in the distribution of heavy care and preferred pay patients, as the latter pay extra fees for private or semi-private accommodation. Mr. Sapsford and Mr. Baldry assured them that they would co-ordinate the logistics involved in the transfer of residents, and that the Ministry would be responsible for soliciting and sorting out individual preferences. Mrs. Burman asked how many of Shalom Village's sixty beds would be required for SENH residents. Shalom Village wished to have as many beds as possible vacant so that it could admit residents from the Jewish community. Mr. Sapsford indicated that he thought ten to fifteen beds might be available. This was apparently based on the plan to close admissions sometime before the transfers, with the result that attrition would reduce the total number of SENH residents and thus the number each home was expected to take. The number of beds available to Jewish residents had been an ongoing concern for Shalom Village, whose representatives had raised this issue as early as the October 13, 1987 public meeting.

37. There was also some discussion about the transfer of staff from SENH to the new

homes. The new licensees stated that they were prepared to consider SENH staff and Mr. Baldry indicated that he would make sure the mechanics of SENH employees receiving application forms and so forth were co-ordinated. Mr. Baldry also said that he thought the process would be difficult in terms of logistics. For example, SENH would need kitchen staff up until the end, and thus if kitchen staff were transferring to a particular facility, it would be advantageous from the Ministry's point of view for them to transfer to Southrim Enterprises which, it was anticipated, would be the last home to open. Dan Skully, one of the representatives of Southrim Enterprises, expressed some encouragement to the other two licensees with respect to their co-operation on the transfer of staff. The other two licensees were more non-committal. Mr. Baldry also agreed to draw up a list of the equipment purchased by the Ministry for the new homes to review, as the Ministry was making it available to them for purchase.

38. In October of 1988 Mr. Baldry wrote to Mr. Sapsford the following memo:

You may already be aware, but Shalom Village and Heritage Green are questioning whether they should continue to try to meet the original deadline for opening. This is in response to local press coverage and rumour that Southrim Enterprises has yet to acquire their site and, moreover, are not even planning to open when the other two are.

I have advised the first two to proceed with due diligence to complete the architectural plan review and approval phase, once that will be essential in any event. However, the prospect that Southrim will not be ready as originally scheduled presents particular problems for them and us at St. Elizabeth.

The questions which have arisen to-date include:

Do they start construction only to sit empty waiting for Southrim? (This holds significant cost implications.)

Or, will we transfer to Shalom & Heritage on schedule and run St. Elizabeth with only a third occupancy?

If staff are to transfer with the residents, as originally contemplated, how do we operate their two facilities and St. Elizabeth with only one staff. (Obviously we could share some nursing staff, but it would be very difficult with dietary and environmental staff.)

How does Shalom Village attempt to obtain fund-raising pledges amid the present uncertainty?

What do we do about extending our lease?

Perhaps Southrim needs to re-assess their commitment and their ability to fulfil it. In any event, if we could come to some common understanding it would be helpful. Without some careful planning now, we could face insurmountable logistical problems next year.

Please advise.

39. Mr. Baldry testified that he had written this memo because he had received a phone call from Mrs. Burman the day before. She had read in the newspaper that Southrim Enterprises had not even acquired its site yet, and as a result the construction schedule for that home would be delayed. Mrs. Burman was concerned that if all three new licensees were not ready at the same time, those that were ready might have to sit empty until all were ready. This had serious implications for Shalom Village's fund-raising. Mr. Baldry told the Board that Ben Hort, a representative from Heritage Green, had raised similar concerns. Mr. Sapsford told Mr. Baldry that Shalom Village and Heritage Green would not be required to remain vacant until Southrim Enterprises was ready, and that they should proceed post haste with their construction. If it was necessary, the

Ministry would continue to operate SENH with only one-third occupancy until the last home was ready.

40. In November of 1988, Mr. Baldry wrote to Heather Boon, by then acting Director of the Nursing Homes Branch, indicating that he had arranged a meeting with the new licensees and attaching briefing notes. Those briefing notes include the following paragraphs:

It should be remembered that, at the direction of the Ministry, I have informed the unions, S.E.N.H. employees and the general public alike that the Ministry will use its good offices to assist S.E.N.H. staff to relocate to the new facilities.

Moreover, these matters were publicly stated as conditions of the R.F.P. - to accept the residents and staff of S.E.N.H. However, neither condition was inserted in the award letter, despite my protest over their conspicuous absence.

The licensees have received substantial benefit (the award of a large number of beds); their co-operation will enable everyone to "win".

The receiving facilities should obtain expert legal counsel before proceeding and should be obliged to inform us as to how they intend to proceed.

41. Under the heading of "Transfer Logistics" and the sub-heading "Staffing" the briefing notes include the following paragraphs:

With the possible exception of a few HCA's, all staff could be relocated to the 3 new facilities. We do not have personnel sufficient to staff dietary and laundry departments at all three facilities (i.e., we have only 3 cooks - Southrim alone will need 3 cooks).

The receiving facilities seek assurance that they will not be obliged to accept poor - performing employees, more employees than they can handle, or employees for positions for which they already have staff. They want to be consulted and screen staff in advance.

The unions want to be consulted. Staff also are asking to have their preferences honoured. Much negotiating will be required.

42. The briefing notes also included the following paragraphs under the heading "Transfer-ring":

Staffing at time of transfer will not be simple! (e.g. SENH will need cooks and laundry aides at the same time the receiving facilities will!).

It would be simpler *if* residents from each nursing unit could be transferred ensemble, as well as the attending nursing staff. But preferences would have to be negotiated away.

43. In the spring of 1989, Mr. Baldry began to hear through various sources that representatives of Shalom Village were indicating that they would not be taking up to sixty residents from SENH but rather something less. In addition, Heritage Green was no longer keeping development pace with Shalom Village in terms of its construction schedule. Moreover, there was still some concern about the progress of Southrim Enterprises' construction. As a result, he recommended as follows:

My own sense of the situation leads me to recommend two things. One, we get the special obligations in writing and agreed to by each perspective licensee (reference section 4(a) of the *Nursing Homes Act*). Secondly, we negotiate a lease extension which will enable the status quo to be maintained until the replacement facilities are ready. Making allowance for staying up to another year seems prudent to me; we can always leave earlier, if we're ready. Moreover, we are on the public record assuring all concerned that there will be no interim relocations, because of the severe trauma relocation presents for residents.

44. The Ministry subsequently entered into further lease negotiations with the Society. At the time the Ministry took control of SENH, Sister Elizabeth had retained possession of some adjacent premises. During the tenure of the Ministry, there had been friction between Sister Elizabeth and Mr. Baldry both with respect to the use of those premises and with respect to some of her staff not employed at the nursing home. As a result, one of the conditions that she stipulated to the renewal of the lease was that Mr. Baldry be replaced as the administrator of SENH. The Ministry agreed, and in August of 1989, Mr. Baldry was recalled from the home to resume his other duties. Shortly thereafter, Mr. Baldry resigned from the Ministry to start a private consulting business. In these proceedings, he testified on behalf of the applicant.

45. Negotiations commenced for the renewal of the applicant's collective agreement in August of 1989. Again, the applicant proposed that a successor rights provision be included in the collective agreement, and again, the Ministry declined to agree. A new collective agreement was signed in December of 1989 which did not include such a provision.

46. In September of 1989, there was a meeting between the new licensees, Mrs. Boon, and Joyce Caygill, the executive director of the Hamilton-Wentworth Placement Co-ordination Service which administers the waiting list for nursing home beds. Leon Price, one of Shalom Village's representatives, testified that the meeting was called by the Ministry because of a crisis occasioned by the fact that Society did not want to renew its lease. As a result, the Ministry had to seriously concern itself with the construction deadlines, and the Ministry representatives asked each licensee when they expected to be ready and when SENH residents would be able to move in. At that meeting, Ben Hort suggested that Heritage Green was prepared to overbed to solve the problem of the lease negotiations. On December 7th, the Ministry advised Mr. Hort that it had approved overbedding at Heritage Green by sixty beds. The purpose of this overbedding was to accommodate the sixty beds awarded to Southrim Enterprises which would not be ready in time. The term for the overbedding was to be an initial period of six months, with the possibility of extending this time frame until Southrim Enterprises had completed their facility. Mr. Hort places this meeting in December of 1988 rather than September of 1989.

47. In December of 1989, Mr. Piersanti wrote to all three new licensees indicating that the applicant was taking the position that they were successor employers pursuant to the provisions of the *Labour Relations Act* and the *Crown Transfers Act* and that as a result, they were required to recognize the union as the bargaining agent and were bound by the collective agreement entered into by the applicant and the Ministry. Mr. Piersanti told the Board that he wrote the letter because he had received the impression that the Ministry was "backing off" its commitment with regard to relocating employees. He told the Board that Louise Bell, the administrator who had replaced Mr. Baldry, had said to him that if she were in his shoes, she would not count too much on the commitment that he perceived had been made. Mr. Piersanti had previously requested meetings with the new licensees but Mr. Baldry had declined to arrange them at the time. He repeated this request to Ms. Bell. She declined as well but provided him with their names and addresses, and he then wrote the letters.

48. These letters understandably created some concern on the part of the three proposers, and on February 8th, 1990 there was a meeting between Mr. Sapsford, who had returned to the Ministry in the position of Acting Director, other Ministry staff and Shalom Village representatives. The purpose of the meeting was to discuss several issues, according to Mr. Sapsford. Firstly, there was the number of Shalom Village's sixty beds that the Ministry would require for SENH residents. At that time, the Ministry expected Shalom Village to open in May or June of 1990. As a result, it had stopped admitting new residents to SENH at the beginning of 1990. Shalom Village sought and obtained a firmer commitment from Mr. Sapsford that at least ten to fifteen of its sixty

beds could be filled by new admissions from the Jewish community. Mr. Sapsford also agreed that if the number of SENH residents declined further, fewer beds might be required for them at Shalom Village. According to Mr. Price, Shalom Village representatives then confronted Mr. Sapsford with Mr. Piersanti's letter and asked whether there was any truth to it and whether they had to take union personnel. They were particularly concerned about whether hiring SENH staff was a condition of the award. Mr. Sapsford assured them that this was not a condition of the award, but that the Ministry wanted them to at least interview SENH staff for positions. Ron Kaplan testified that Mr. Sapsford made it clear at this meeting that there was no obligation to hire SENH employees who did not meet Shalom Village's criteria, and that Mr. Sapsford had said that successor rights did not apply. Mr. Sapsford told the Board that this statement was his own personal opinion, and not the position of the Ministry. Mrs. Burman testified that Mr. Sapsford had said that this was the position of the Ministry. Pat Morden, Shalom Village's Director of Nursing, gave evidence that during the meeting Rosemary McColl, the manager of the Nursing Homes Branch left the room to find the award letter. Ms. Morden testified that Mr. Sapsford then said that the Ministry wrote the award letter specifically with the intent that there would be no connection to SENH.

49. In January of 1990, residents and their families and friends were sent a three page information package by Ms. Bell. This package allowed residents to state their preference for either Heritage Green, or Shalom Village, or any other home in Ontario. The Ministry witnesses indicated that although every effort would be made to accommodate the choice of residents, in fact there was a waiting list of some five hundred people for nursing home beds in the area, and that as a result there were limitations on the extent to which preferences could be accommodated.

50. On October 29th, 1990, Shalom Village opened. At that time, as a result of closed admissions, attrition and some other transfers, there were approximately eighty-nine residents left at SENH. Of those, thirty-five transferred to Shalom Village. Eight of the Shalom Village beds were filled by residents from the apartment complex, and the remainder of its sixty beds were filled from other nursing homes or the waiting list.

51. Shalom Village interviewed everyone who applied for employment both from SENH and elsewhere. Mrs. Burman was in contact with Mr. Baldry, and Ms. Morden spoke with her counterpart at SENH, Elaine Twaddle, to ensure that SENH employees knew that Shalom Village was hiring. Ms. Morden testified that she was told by the Board of Directors that Shalom Village did not want it to look like it had not given SENH staff a chance, and that it wished to appear fair both because of its reputation in the community and because of this application before the Board. There were twelve applications for employment from SENH staff, all involving health care aides. Positions were offered to eight, one of whom declined. All twelve passed an initial interview but three did not pass a role playing exercise and one did not wish to attend for it. All those who accepted positions commenced employment with Shalom Village on October 22nd, 1990. The seven health care aides from SENH made up a portion of the total of twenty-five health care aides at Shalom Village. The remainder were hired from elsewhere, together with six registered nursing assistants and six registered nurses.

52. In the early summer of 1990, Mr. Piersanti was presented with a severance package by the Ministry for SENH employees. He told the Board that it was a very generous arrangement, involving almost double the benefits to which employees would be entitled under the *Employment Standards Act*. He was not prepared to approve this package as he was concerned that it might jeopardize the applicant's successor rights position, but the Ministry proceeded to implement its terms in any event. One of the conditions of the arrangement was that employees had to remain at SENH until it closed before they would be eligible for the benefits. Ms. Bell did allow one

employee who had been hired by Shalom Village to accept a lay-off out of seniority so that she would qualify for the severance package. SENH closed in January of 1991.

53. Based on this sequence of events, the applicant advanced two main arguments. Firstly, counsel argued, the takeover by the Ministry of SENH amounted to a transfer of an undertaking to the Crown within the meaning of the *Crown Transfers Act*, and subsequently, the Crown transferred part of that undertaking to Shalom Village. In the alternative, the applicant took the position that the events described above represented a sale of a business within the meaning of section 64 of the *Labour Relations Act* from SENH to Shalom Village through the Ministry as a third party intermediary. The Ministry and Shalom Village agreed in final argument that SENH had become a Crown undertaking after the takeover by the Ministry. However, they disputed that the subsequent events amounted to a transfer of part of an undertaking from the Crown to Shalom Village, or that the entire sequence represented a sale of a business through a third party intermediary.

54. The *Crown Transfers Act* has its legislative roots in a decision by the Board in 1975 to the effect that the successor rights provisions of the *Labour Relations Act* did not apply to the Crown. Shortly after the Board's decision in *Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777, the *Crown Transfers Act* was passed, addressing a number of scenarios involving transfers to and from the Crown and the labour relations consequences which flow from them. This Board and the Ontario Public Service Labour Relations Tribunal are assigned a variety of functions and powers in the legislation. The respective jurisdictions of these two bodies are not as precisely delineated as they might be. However, a common sense reading of the statute suggests that the primary jurisdiction to make declarations and provide ancillary relief in the case of a transfer from an employer to the Crown rests with the Tribunal, while a reciprocal jurisdiction in the case of a transfer from the Crown to an employer lies with the Board. Since it was common ground between the parties that SENH had become a Crown undertaking after the takeover by the Ministry, it was not necessary for us to make any findings in this regard or to consider whether we had any residual or concurrent jurisdiction to do so.

55. Starting from the parties' agreement in this regard, we must determine whether a part of that Crown undertaking was transferred to Shalom Village by virtue of the events described above. The relevant definitions of "transfer" and "undertaking" are set out in the *Crown Transfers Act* at subsections 1(f) and (h):

(f) "transfer" means a conveyance, disposition or sale;

(h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.

56. The Board considered the application of these provisions in a number of cases including *The Ministry of Natural Resources*, [1986] OLRB Rep. Mar. 331 and *KBM Forestry Consultants Inc.*, [1987] OLRB Rep. Mar. 399 aff'd Ontario High Court of Justice, April 25, 1988), in which it observed that although the *Crown Transfers Act* was modelled after the successor rights provisions in the *Labour Relations Act*, the former used broader language. In *KBM Forestry*, *supra*, the Board noted that this more expansive wording reflected the nature of certain of the wide range of activities engaged in by government, and described the purpose of the *Crown Transfers Act* in these terms:

Underlying the legislation is the recognition (a recognition also underlying section 63 of the *Labour Relations Act*) that "the continuity of the work performed before and after the transfer [is of "particular significance"], since the trade union is certified to represent certain work

groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement”: *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, paragraph 32, cited in *The Ministry of Natural Resources*, *supra*. More specifically in the context of the *Successor Rights (Crown Transfers) Act*, the gains achieved by the union with respect to the jobs which are integral to a particular government program are not to be lost through the government’s transferring that program (and those jobs) to a private entity (and *vice versa*). From another perspective, it may be said that whatever protections or conditions accrue to those jobs through representation by the union are not to be threatened through the government’s transferring the program or portion of a program, of which they are a part, to a private entity.

57. In both cases, the Board observed that the form of the *Crown Transfers Act* and the context in which it was enacted made it apparent that it was intended to apply *at least* to those circumstances in which the Board has found a sale of a business under the *Labour Relations Act*. As a result, a brief look at some of the jurisprudence under the *Labour Relations Act* is helpful.

58. In a number of cases, the Board has emphasized the significance of the continuity of the work before and after the sale in assessing whether a business has been sold. In *Culverhouse Foods Limited*, [1976] OLRB Rep. November 691, the Board said as follows:

13. In the *Dufferin Steel* case, *supra*, the Board itemized factors which the Board might consider in determining whether or not there has been a section 55 sale: goodwill, described at p. 86 as “the attractive force which brings in customers”, and its sources, i.e. good name, reputation and business connections, good relations with employees, favourable commercial contractors, franchises, good financial relationships and good management, and the continuation of employees.

Notwithstanding the importance of the above, the Board was very clear to emphasize that these factors are only significant to the extent that they resolve the more important question of whether or not the business sold continued after the sale. The Board indicated that the most relevant factor for determining this question is whether the nature of the work performed subsequent to the transaction is the same as the work performed prior to the transaction.

59. Similarly, in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, the Board elaborated upon this proposition:

32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55. This approach has not only been taken by the Board in a number of cases (see, for example, *Culverhouse*, *supra*, and *Dennis Moran* [1977] OLRB Rep. Apr. 277) but also appears to have been adopted by the British Columbia Supreme Court in *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41. In that case, the Court was considering an application for *certiorari* in respect of a decision involving what was then the successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J. characterized the question before the Board as follows:

“One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the interferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the ‘business’ in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the*

same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer." [Emphasis added]

Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

60. The Board has had particular experience in applying this approach to the nursing home sector. Some of those cases have similar aspects to that before us, and as a result, it is useful to set out their facts in more detail than usual. In *Riverview Manor*, [1983] OLRB Rep. Sept. 1564, a purchaser bought a nursing home license and another piece of land from a vendor on which the purchaser intended to build a new facility to which the license would be applied. The license was approximately 18 per cent of the total cost of the new home. The contract of sale was conditional upon the Ministry of Health approving the transfer. In this regard, the purchaser had to submit a management package to the Ministry detailing its experience in the industry, the activities planned for the residents, the design of the home and financial data. The purchaser's operations manager, administrator/director of nursing, food supervisor, activity director and accountant were then interviewed by Ministry officials, and in the fall of 1982, the Ministry authorized the transfer of the license.

61. Construction started in October of that year and was completed in August of 1983. Of fifty-one residents from the vendor's nursing home, eighteen were transferred to an Extendicare home in February of 1983. Thirty-three residents transferred to the new home, which had a capacity for fifty-one residents, and five of those who had moved to Extendicare eventually transferred to the new home. Residents of the vendor's home were under no obligation to transfer to the new home, although, as in the instant case, the demand for beds exceeded the supply in the area. In addition, those residents that transferred to the Extendicare home were not obliged to transfer again to the new home. The employment of all of the vendor's employees was terminated in August of 1983. All were interviewed by the purchaser, and three members of a bargaining unit of thirty-one were hired, in addition to four or five non-bargaining unit personal. The management team for the new home was drawn from other nursing homes owned by the purchaser, and the remainder of the staff was hired from elsewhere.

62. In these circumstances, the Board found that there had been a sale of a business. Although the only assets transferred were a piece of land and the license, and although the home's premises were not part of the transaction, the Board found that the license was the essence of the business, and its transfer was particularly significant because it led most of the residents of the prior home to move to the new home:

38. The same criteria ought to be applied to the case at hand, and lead us to the conclusion that a business has been sold. As to customers, the vast majority of the former residents of Balmoral Lodge are now residing at Riverview Manor. That is not surprising. An employer who gives up a licence or government contract, voluntarily or otherwise, can no longer service its former clientele. Along with the licence or contract, the successor often receives a captive market that is free of competition, not only from the predecessor, but also from others who lack the necessary authorization to carry on business. Riverview obtained two major assets from Balmoral, the licence and the land. The transfer of the licence is particularly significant, because it led most Balmoral residents to move to Riverview Manor. (Both parties to the transaction contemplated residents would move from one home to the other, as evidenced by the contract that ties the date from which interest runs to the transfer of patients.) In this sense, the licence is the essence of the business. There was little else Balmoral could have conveyed to Riverview. Balmoral Lodge could no longer be used as a nursing home, and Balmoral's only other assets were equipment and supplies. The transfer of the licence was subject to the approval of the Ministry of

Health. But the role of this third party is of no relevance: see the cases referred to at paragraph 33, *supra*.

63. In *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060, the purchaser owned a number of nursing homes across the province. It had entered the local scene previously by submitting a bid on fifty-six new nursing home beds for which the Ministry of Health had called for tenders. The purchaser's proposal was to build a new home for the beds. The Ministry invited the purchaser to re-tender for forty-one beds as it wished to have a broader distribution of the fifty-six beds, and the purchaser did so. On March 7, 1983, the purchaser was awarded the forty-one beds and drew up plans for a new building which would include forty-one nursing home beds and forty-one rest home beds. The latter are not funded by the Ministry and do not require Ministry approval.

64. Just prior to the award, the purchaser became aware that another home was being put up for sale by its receiver/manager. On March 14th, 1983, the purchaser submitted a tender to buy the home, subject to it receiving the new beds tendered for earlier. The receiver/manager suggested that the purchaser re-tender for the license alone as there were problems with the premises and other assets. In any event, it was never the purchaser's plan to occupy the building of the previous home but rather to add its seventy-five licensed beds to the forty-one new beds for which it was constructing a new facility. The evidence in that case indicated that acquiring a license could be valued at between \$8,000 and \$12,000 a bed. The purchaser acknowledged that the value of the beds were higher if they were already occupied. The transaction was again conditional upon the Ministry's approval. The purchaser then took over the management of the previous home until the new facility was ready and the sale could close. The Ministry issued a tentative approval to the purchaser for the seventy-five beds in August of 1983, conditional upon the final inspection and approval of the new facility. All of the residents of the previous home were to be transferred, except for a small number of special care patients.

65. The receiver/manager terminated the employment of all its employees when the new facility was ready and the purchaser advised them that it was taking applications for employment. The purchaser also advertised for staff and received some two hundred and fifty applications, including those of the receiver/manager's employees. All of the latter employees who expressed an interest were offered jobs. Of thirty employees who had worked for the receiver/manager, eight eventually were employed by the purchaser, some for the nursing home and some for the rest home.

66. In coming to the conclusion that these events represented the sale of a business under the *Labour Relations Act*, the Board noted two significant facts. First, the purchaser had purchased the license which was the government-restricted right to operate the seventy-five nursing home beds. (In this sector, the license and the beds are synonymous.) Second, there was a finding of sale even though the vendor's beds formed only a portion of the purchaser's facility, and the purchaser was firmly established in the nursing home business prior to the transaction.

67. The Board also commented on the evidence that licenses are not actually "transferred" between operators:

18. Dealing with counsel's first point, the evidence of the Ministry makes it clear that licenses cannot technically be "transferred" from one operator to another. Rather, one operator agrees to surrender its licence on the condition that the other be granted comparable one and it is then up to the second operator to satisfy the Ministry that it is an appropriate replacement. If it does, it is ultimately issued a new licence in its own name. The evidence further discloses that the Ministry can on its own initiative only relieve an operator of its licence on limited and narrow grounds, and after lengthy proceedings. That circumstance, plus the fact that the provincial gov-

ernment tightly controls the number of nursing care beds it will make available in an area (the Ministry pays two-thirds of the cost of each bed), makes an agreement by an existing operator to voluntarily relinquish its rights in favour of another operator an extremely valuable one. The respondent paid just under a million dollars to secure that agreement in the present case.

68. Against this background, we turn to the specific facts before us. In considering whether there has been a transfer of the Crown undertaking of SENH to Shalom Village, we must distinguish in this case between the function of the Ministry in issuing the license to Shalom Village and the role of the Ministry in operating SENH. It is the latter with which we are concerned here. It was not suggested that the Ministry's normal functions with respect to the request for proposals process and the awarding of the licenses alone would lead to a characterization that the recipients of the licenses had been involved in a transfer from the Crown. Rather it was the fact that one-third of the licensed beds previously operated by the Ministry at SENH were awarded to Shalom Village which gave rise to the applicant's position.

69. The fact that the licensed beds passed to Shalom Village by means of a request for proposals process rather than a direct commercial transaction is not particularly indicative of whether a transfer has occurred in the specific circumstances of this case. The Board has dealt with similar kinds of dispositions in cases both under the *Labour Relations Act* and under the *Crown Transfers Act*. In *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, the Board addressed an application under section 64 of the *Labour Relations Act* [then section 55]. In that case, ambulance service had been provided to the Municipality of Thunder Bay by two local hospitals. When those operations were discontinued, the Ambulance Services Branch of the Ministry of Health conducted a request for proposals to operate a new ambulance service. The director of one of the two former hospital services submitted a proposal which was accepted by the Ministry. The Board noted that the successor rights provisions did not require that there be a direct transfer between the predecessor and the successor, and found that there had been a sale of a business despite the fact that there was no direct contact between the predecessor hospitals and the successful bidder, and that no consideration had passed between the two:

16. In a strict commercial or corporate sense, it is clear that there has been no transfer between the predecessor hospitals and the respondent as would constitute a sale. Indeed, the predecessors had no assets, inventories (other than sheets, towels and other toiletries), accounts receivable or customer lists which could have been transferred and they were prohibited by law from transferring their licenses to operate. The predecessors depended upon the maintenance of their relationship with the Ministry and not on customer goodwill. As discussed in para. 13 herein however, the Board must look beyond the form of the transaction in determining if there has been a "sale of a business" within the meaning of Section 55 of the Act. Notwithstanding the absence of contact between the hospitals and the Thunder Bay Ambulance Service, and notwithstanding the lack of consideration given and received between the two, the Board is satisfied that the essential elements of the predecessors' businesses were transferred to Thunder Bay Ambulance Services Inc. so as to constitute the sale of a business within the meaning of Section 55 of the Act.

Similarly, the Board has found Crown transfers in a number of cases where contracts for services were let by a tendering process of one kind or another, including requests for proposals. (See *KBM Forestry*, *supra*; *The Ministry of Natural Resources*, *supra*; *Charmaine's Janitorial Services*, [1988] OLRB Rep. Sept. 871; *Dunning Paving Limited*, [1989] OLRB Rep. July 714 and *Agassiz Forestry/Environmental Services*, [1990] OLRB Rep. June 633).

70. Considerable evidence was led with respect to the nature of the request for proposals process which is normally used for the awarding of newly licensed beds, and the licensing procedure in the case of a commercial transaction which involves pre-existing beds. In fact, the form of the request for proposals process in this case, which involved previously licensed beds, was not so

very different from the licensing procedure when there is a direct commercial transaction. In both cases, the license reverts to the Ministry and a new one is issued; in both cases the prospective licensee or licensees are scrutinized by the Ministry with respect to their ability to operate a nursing home, and in both cases, approval is largely, if not entirely, contingent upon the prospective licensee or licensees accepting the residents of the predecessor home. In either case, it is not necessary for a license recipient to take over physical premises, although a license is only granted when physical premises, either new or pre-existing are equipped with staff and pass a pre-licensing inspection. According to Mr. Sapsford, licenses can be marketed commercially without any kind of premises or facility, as long as the purchaser eventually takes the residents and the Ministry approves. In other words, any distinctions between the licensing process here and that in a direct commercial transaction are not particularly helpful, and the Board's jurisprudence indicates that neither the form nor the nature of the transaction in this case negate the possibility of a transfer within the meaning of the *Crown Transfers Act*.

71. However, the only physical asset that passed between the Ministry and Shalom Village was the sixty licensed beds. There was no dispute that although Shalom Village contemplated the possibility of purchasing some of the equipment the Ministry had acquired during its tenure, it decided not to do so. Nevertheless, the Board has found a sale of a business under the *Labour Relations Act* where a license was the only asset transferred, because the license is the essence of the business in the nursing home industry and because it tends to bring with it a captive market of residents (*Caressant Care, supra, Riverview Manor, supra*). And in this case, a significant number of residents did transfer with the license. Of course, in *Caressant Care, supra*, the purchaser had paid almost a million dollars for the license, reflecting its relative value. In this case, no such consideration was paid. However, as the Crown transfer cases cited above make clear, this is not unusual given that the role adopted by the Crown is that of providing services, rather than running a business for profit. In this case, there was no question that the SENH license was extremely valuable. Indeed, Mr. Sapsford testified that the Ministry was surprised that the Society chose not to appeal the revocation of the license for that very reason. As a result, it is clear that Shalom Village obtained a valuable asset when it was awarded one-third of the SENH beds, even though in the unusual circumstances of this case there was no direct commercial transaction.

72. The nature of the undertaking in the case of SENH was the operation of a nursing home, and according to the Board in *Caressant Care* and *Riverview Manor, supra*, the essence of that operation is the license. Shalom Village received what amounted to a portion of that license when it was awarded the license for sixty of the SENH beds. There was no question that those beds came from SENH. Indeed, the Ministry's witnesses often referred to them during their testimony as the "St. Elizabeth beds" or the "replacement beds". If the Ministry had continued to operate SENH, Shalom Village would not have received the license that it did. The only reason that that portion of the license became available for tender was because the Ministry wished to close SENH. Mr. Sapsford testified that if the Society had appealed the revocation of its license, the Ministry would not have issued the request for proposals for the SENH beds, presumably because there was a chance the Society might have been successful in retaining the beds. Similarly, Shalom Village did not even start construction of its new facility until it received the award, for obvious reasons. In other words, the asset that was transferred was not only valuable but absolutely critical to Shalom Village's operation and it was unequivocally tied to transferring the residents.

73. It is true that only between one-third and one-half of the residents of SENH transferred to Shalom Village when the latter opened. Moreover, this is not a case where the fact that the licensed beds were occupied increased their value, at least to Shalom Village. On the contrary, its concern throughout was that at least some of the sixty beds awarded to it be vacant so that it could admit its own clientele. Nevertheless, it is quite clear from the evidence that Shalom Village was

committed to taking as many residents of SENH as the Ministry required, although it was hoped and indeed expected, that that number would be something less than sixty. Because construction was delayed for a variety of reasons, admissions at SENH were actually closed approximately nine months before Shalom Village opened, rather than the anticipated three or four months. This had the effect of reducing further the number of SENH residents it ultimately received. Nevertheless, over half of Shalom Village's beds were occupied by SENH residents when it opened, and it was apparent from the evidence of Mr. Sapsford that Shalom Village would not have received the award it did unless it had agreed to take the SENH residents. Whether or not this could be characterized as a formal condition of the award, it is clear from the evidence of Dr. Kaplan that Shalom Village was aware of this requirement. Although the guaranteed SENH clientele may not have been considered "assets" from the point of view of Shalom Village, this fact does tend to highlight the continuity of the undertaking before and after the transfer.

74. A great deal of evidence was also led with respect to the nature of the commitment made by Shalom Village with respect to SENH employees. In addition, Shalom Village witnesses testified at some length with respect to the importance of allowing them to select their own staff in accordance with their criteria and philosophy. It was evident that the Ministry wished the three new licensees to take the majority of the SENH staff between them, and in fact expected that they would. It was equally apparent that the Ministry was not prepared to extract any commitment from the licensees stronger than that of "considering" the staff for employment, and was not prepared to make even that a condition of the award, at least explicitly. This lack of clarity enabled Shalom Village to minimize its commitment to SENH employees in favour of its concerns about the importance of selecting its own staff.

75. However, the Board has noted previously under section 64 that the failure of a successor to hire a predecessor's employees will not negate a finding of a sale because of the potential that parties have for structuring their transactions to minimize or avoid the movement of employees and the temptation to do so if the Board were to rely on this. (See, for example, *Zehrs Markets Limited*, [1974] OLRB Rep. May 331; *Sisman's of Canada Limited*, [1980] OLRB Rep. July 1059.) The Board has also found Crown transfers where there is little or no transferring or re-employment of employees. (See, for example, *KBM Forestry*, *supra*; *Charmaine Janitorial Services*, *supra* and *Dunning Paving*, *supra*.) Moreover, as the Board pointed out in *Riverview Manor*, *supra*, many successors would prefer to be free to select their employees according to their own standards, but to this preference would effectively undermine successor rights. In this case, we accept that the commitment made by Shalom Village to the Ministry was very limited, that is, only to "consider" SENH staff for employment. However, the fact that even that commitment was made, regardless of when it was made and whether the license was actually contingent upon it, tends to reinforce the links between SENH and Shalom Village. This is particularly so in light of the co-operative arrangements between the Directors of Nursing of each home with respect to application forms and references and the number of SENH staff who were ultimately hired.

76. Some of Shalom Village's evidence was directed at the fact that it was already established in the operation of the apartment complex, and that the nursing home, which had been contemplated from the outset, was in the nature of an expansion of its pre-existing operation. We do not think that the existence of the apartment complex suggests that Shalom Village was operating a parallel enterprise, and that the roots of the nursing home were in that enterprise rather than in SENH. As noted previously, Shalom Village would not have received the license it did if it were not for the fact that the Ministry wished to close SENH and redistribute the beds. Moreover, in *Caressant Care*, *supra*, the Board highlighted the fact that the purchaser was already established in the nursing home field in the relevant geographic area. This did not prevent the Board from finding that a sale had occurred, even though the beds from the predecessor formed only a portion of

the subsequent operation. In this case, while the Shalom Village beds were only one-third of the SENH total, they formed the entire nursing home operation for Shalom Village. Although there is some minor degree of interchange between several of the staff of the nursing home and the apartment complex, they are significantly different types of operations, and the proposition that the SENH beds represented only an expansion of a pre-existing operation is simply not persuasive on the facts before us. Moreover, the Board has found Crown transfers even where previously established operations contracted with the Crown to perform certain services. (See, for example, *KBM Forestry, supra.*)

77. There is some analytical tension between the fact that the *Crown Transfers Act* captures transfers of a part of an undertaking, and the proposition that if too small a portion is transferred, it may no longer represent the transfer of an undertaking at all. The line between these two situations is particularly difficult to discern in the case of a Crown undertaking, given the Board's observation in *Charmaine Janitorial Services, supra*, that the notion of a coherent and severable part of the business is not necessarily appropriately transferred to the *Crown Transfers Act*. We were not asked to comment on the minor awards from the SENH pool to pre-existing homes to increase their licensed capacity by two to five beds in this context, and we do not find it advisable to do so except to say that they represent different fact situations from that before us.

78. Both the Ministry and Shalom Village argued that this situation was more analogous to a case where an enterprise had failed or gone bankrupt, and that as a result, there was no continuation of the enterprise. However, the Board has found that there has been a sale of a business even in business failure or bankruptcy circumstances, including the pertinent example of *Caressant Care, supra*. In any event, the bankruptcy analogy is not particularly apt. There is no doubt that SENH was in serious trouble at the point at which the Ministry took over the enterprise, at least with respect to the kind of care it was providing to residents. Nevertheless, it is clear that matters improved immediately with the increased resources and expertise the Ministry was able to bring to bear on the situation. There was no evidence that the Ministry was required to close SENH for business or other reasons; rather the evidence is that it wanted to close SENH because it did not wish to operate a nursing home, the same reason that many predecessors have disposed of their operations.

79. Shalom Village led a considerable amount of evidence to the effect that its operation could be distinguished from that of SENH by virtue of its unique ethnic orientation, and certain other features such as the division of Shalom Village into modules to avoid an institutional atmosphere, its emphasis on independence and rehabilitation on the part of its residents, and so forth. To its credit, Shalom Village did not argue that it required its staff to be Jewish and indeed of the current employees, only Ms. Burman is Jewish. In response, the applicant took the position that the nursing home industry was so heavily regulated with respect to hours of various types of nursing and other care, nutritional standards, and other requirements, that nursing homes were much more standardized than other operations might be. As a result, any distinctions which might be drawn between SENH and Shalom Village were minor in terms of the overall continuity of the undertaking.

80. The evidence led before us was sufficient to persuade us that Shalom Village was a good nursing home with a progressive philosophy and a specifically Jewish ambience. Nevertheless, the essence of its operation was to provide geriatric residential care to an ailing and elderly clientele, and in this respect, it was no different than any other nursing home including SENH. In other words, the nature of the work performed before and after the license transfer was the same, and the differences between Shalom Village and SENH amounted to minor nuances on this central theme of running a nursing home. Counsel for Shalom Village acknowledged that in light of the

Board's jurisprudence with respect to section 64(5) of the *Labour Relations Act*, he was not suggesting that Shalom Village had changed the character of the undertaking so that it was substantially different within the meaning of section 4(2) of the *Crown Transfers Act*. As a result, we note in passing only that the Board said in *Caressant Care*, *supra*, that moving a nursing home operation to upgraded facilities does not represent the kind of change envisioned by section 64(5).

81. Shalom Village also emphasized the fact that it had previously applied for new beds unrelated to those at SENH. Counsel appeared to suggest that because Shalom Village had no interest in the source of the beds but simply wished to acquire a license, it should not be subject to successor obligations. In his view, Shalom Village had a right to pursue its dream of a nursing home for the Jewish community in Hamilton without interference.

82. It is quite true that Shalom Village might have obtained a license in circumstances from which no statutory labour relations consequences would flow. In this case, however, it did not. The licensed beds which Shalom Village received came from SENH, a fact Shalom Village representatives knew from the outset. And in this legal context, the source of the undertaking or a relevant portion of the undertaking is crucial. This is because the underlying purpose of the *Crown Transfers Act*, like that of section 64 of the *Labour Relations Act*, is to protect the continuity of bargaining rights and the benefits and obligations which flow from them. (See, for example, *KBM Forestry*, and *Charmaine's*, *supra*). If the source of the transferred undertaking is subject to such rights, those rights will transfer as well, in the manner set out in and subject to the provisions of the *Crown Transfers Act*, regardless of the transferee's or successor's wishes. Moreover Shalom Village appeared to be suggesting that collective bargaining and its own worthy and laudable goals were incompatible. Even assuming, without finding, that we would be prepared to entertain such an argument, there is nothing before us which would support such a proposition.

83. Some of the evidence led by Shalom Village appeared to be directed at a sort of estoppel argument, to the effect that because the Ministry had not expressly required the new home to take the SENH staff, it would be unfair to Shalom Village at this point to make a declaration from which this result might flow. Emphasis was placed on Mr. Sapsford's statement to Shalom Village representatives in February of 1990 that successor rights did not apply. However, even if we assume, without finding, that it is possible to apply an estoppel-like concept either to the Crown or in these circumstances, this suggests that the Board should decline to provide a remedy which is otherwise necessary or appropriate because one of the parties did not sufficiently inform itself with respect to its legal obligations. We do not find this persuasive, particularly in light of the fact that Mr. Sapsford represents the Ministry, not the applicant. Nor can Shalom Village accurately characterize itself as an innocent victim of these circumstances. Indeed, it is clear from the evidence that shortly after the award, Shalom Village became aware that Mr. Baldry and Mr. Sapsford had somewhat different views with respect to the nature of its obligation toward the SENH staff, and that it preferred to rely on the Ministry's ambivalence in the hope that its ultimate obligation would be minimal. Moreover, given Mr. Baldry's assurances to Mr. Piersanti, it may be said that the equities in this case are fairly evenly divided.

84. The Ministry argued that if we found a transfer in these circumstances, it would make life more difficult for it with respect to other takeovers under the *Health Facilities Special Orders Act*. However, we note that the Ministry agreed that SENH had become a Crown undertaking subsequent to the takeover. We also observe that the Tribunal has already found that a takeover under the *Health Facilities Special Orders Act* can amount to a transfer to the Crown (See Ontario Public Service Employees Union, T/0027/85 March 6, 1987). Counsel for the Ministry indicated that its agreement in this regard would not necessarily be forthcoming in a situation which more closely approximated the circumstances contemplated in that Act, that is, where the Ministry takes

over the operation of a facility on an emergency basis for a much more limited period of time. Mr. Sapsford also testified that the Ministry had a number of options available to it in these circumstances. As a result, and given the inchoate and vague nature of the difficulties cited, we are not convinced that this should deprive the applicant of relief to which it would otherwise be entitled.

85. In summary then, a portion of an asset which the Board has said is the essence of a nursing home business passed from the Crown undertaking of SENH to Shalom Village by means of a tendering process which falls within the definition of a transfer. SENH's undertaking was that of a nursing home and Shalom Village entered into the operation of a nursing home as a result of receiving part of SENH's licensed beds. In addition, there were a number of links between SENH and Shalom Village with respect to the residents and employees which reinforced the continuity between the two operations and the fact that the nature of the work performed before was the same as that performed subsequent to the transfer. For all the reasons set out above, we find that there has been a transfer of a part of an undertaking from the Crown to Shalom Village within the meaning of the *Crown Transfers Act*. As a result of our analysis and conclusions, it is not necessary for us to address either the applicant's alternative argument with respect to section 64 of the *Labour Relations Act*, or several rulings on which we had reserved.

86. The parties asked that we issue only this declaration and allow them an opportunity to agree on any other remedy. At their request, we remain seized both of any other relief and with respect to implementation.

87. We have now had an opportunity to review our colleague's comments, many of which appear to be directed at whether SENH became a Crown undertaking as a result of the Ministry's takeover under the *Health Facilities Special Orders Act*. We would note merely that this is not an issue which we have decided. As a result of the parties' agreement that SENH became a Crown undertaking after the Ministry's takeover, we have addressed only whether the subsequent events amounted to a transfer of a portion of that undertaking to Shalom Village.

88. A number of our colleague's other comments, including those with respect to abandonment, notice to employees and the Ministry's conclusion that SENH's staff had become civil servants, were not argued or relied upon by the parties. In this regard we would note only that since Shalom Village had no employees when these proceedings commenced, it was not possible for the Board to notify them of the proceedings. The hearings in this matter took place over a period of a year and one-half, during which time this issue was never raised, even by our colleague. There was no evidence with respect to whether Shalom Village advised any employees it subsequently hired of the on-going litigation.

DECISION OF BOARD MEMBER R. M. SLOAN; July 10, 1992

I Introduction

1. With respect, I dissent from the majority decision, the net result of which imposes union representation upon a group of employees at Shalom Village, depriving them of their rights under Section 3 of the *Ontario Labour Relations Act* which reads, in part:

3. Every person is free to join a Trade Union *of his own choice ...*" (emphasis added).

2. The issue of whether a sale of a business or a Crown Transfer has occurred depends very much on the facts in each case. In this case, in addition to the aforementioned issues, there are a number of considerations which individually or cumulatively, warrant the dismissal of the application or at the very least the ordering of a representation vote, and they include: the Ontario

Ministry of Health's (MOH) mandate on the St. Elizabeth Nursing Home (SENH) site; the issue of hiring SENH staff, the MOH decision re SENH employees representation; the Crown Transfers Act matter; the sale of a business consideration, and the timeliness of the application.

II The Ontario Ministry of Health's Mandate

3. It is worthwhile noting that the circumstances that arose and unfolded with respect to the Ministry's presence at the SENH site were indeed novel and unique. In his opening remarks, counsel for the applicant acknowledged to the Board, on two occasions, that the facts relating to this case are "novel" and that a similar case had not previously been adjudicated by the Board.

4. As stated in paragraph 3 of the majority decision, the Ministry assumed operation of the SENH by virtue of its rights and obligations under the Health Facilities Special Orders Act. (HFSOA). The actions taken by the Ministry were motivated, according to the testimony of Mr. Ron Sapsford, out of concern for "... the health, safety and well-being of the residents". Indeed, the exercising of its obligations to residents is the "*raison d'être*" for the HFSOA itself.

5. The Ministry's mandate is clearly set out in the HFSOA and does not include the option of operating the SENH on anything but a temporary basis - the Ministry did not purchase *nor did it assume ownership* of any of the business, assets, property, buildings, plant, equipment, or facilities that made up the SENH complex. The majority decision refers, in a number of instances, to the fact that it was not the intention of the Ministry to operate the home on a continuing basis - under its mandate the Ministry did not have a choice in this respect.

6. The HFSOA makes it quite clear under Section 7 (1) that where the Minister takes control of and operates a health facility it does so on a temporary basis, initially "... for a period not exceeding six months" and under Section 7 (2) the HFSOA is very specific in detailing the responsibility of the Minister under this Act "... to conduct, manage, operate and administer the health facility", quite clearly this is an "undertaking" on the part of the Crown.

7. This being the case - the Ministry in keeping with its legislated obligations and prime responsibility - assumed, temporarily, the administrative control of the St. Elizabeth Home for purposes of *safe-guarding the well-being of its residents*.

8. It is important to make the clear distinction in this case that while the Ministry took over the operation of the SENH *it did not assume ownership*. Significantly absent from the HFSOA is the right of the Ministry to assume such ownership. It was abundantly clear from the outset - and this is indeed what eventually occurred - that once the last resident left the SENH, the Ministry was history there - it no longer had any presence at the SENH site.

9. With the absolute revocation of the SENH licence, any licence to operate beds for the 184 residents ceased to exist. In paragraph 11 of the majority decision it is acknowledged that the Ministry did not issue a licence to itself. The authority to operate the facility was acquired under the HFSOA.

10. The Ministry did not need to issue a replacement licence to itself under the provisions of the HFSOA, nor did it do so. Therefore there was no transfer of any part of the SENH licence - it could not have taken place because the original license with SENH became non-existent, and was not replaced and, *this is a fact that is incontrovertible*. In a letter dated November 4, 1988, from Mr. Emery Baldry to the Ontario Nurses Association, Mr. Baldry wrote "The nursing home licence which had been granted to the St. Elizabeth Home Society was revoked last year by the Ministry and *will not be reissued* (emphasis added).

11. There was no transaction to connect the SENH with any of the six (6) nursing homes that eventually acquired residents from the SENH. (There are the three nursing home involved in the bids for new licenses, viz., Shalom Village; Southrim Enterprises; and Heritage Green - and the three (3) nursing homes that were not involved in the bidding process but nevertheless received a number of SENH residents.

12. In essence and in fact it was not a take-over (with all that may imply) of an operation but the revocation of a licence and the temporary operation of a facility. There was, in my view, an absolute and unequivocal separation in all material aspects of the SENH and the six (6) nursing homes which acquired residents from the former SENH facility.

13. The SENH licence was revoked, became non-existent and a process was instituted to issue new licenses, not transfer the licenses to the three main bidders the Ministry undertook to issue new, original licenses, (unqualified as to the revoked SENH licence).

14. The Ministry was not a successor to the SENH and could not legally become so under the HFSA. In paragraph 15 of the majority decision it is acknowledged significantly I contend, that "... there was no commercial transaction with a purchaser at the end of it".

15. In *Riverview Manor, supra*, the Board emphasized at paragraph 38 that the transfer of the licence was particularly significant because it led most of the *residents* of the first nursing home to move to Riverview Manor. (The majority acknowledges this in para 73.) In that case, the vast majority of residents followed the licence.

16. The instant case is quite different on the facts. First of all, Shalom Village only obtained 60 licenses, where SENH had 184, and well over half of SENH'S former residents went to other nursing homes. Secondly, Shalom Village had wished to fill the new beds with members of the Jewish community and had previously applied for licenses for empty beds. The former SENH residents which the MOH required Shalom Village to take as a condition of the new licence were not in that sense a valuable asset to Shalom Village.

17. Unlike the facts in *Riverview Manor*, in this case, none of the assets and a small minority of the residents of SENH ended up with Shalom Village. In addition, and this bears emphasis in Riverview Manor the licence was sold to Riverview as part of a business and its "transfer" was approved after the fact by the Ministry.

18. Furthermore, residents of the SENH facility were asked to express their preferences with respect to their placement. Presumably, had none requested Shalom Village, the majority and the Board would not have found that a Crown Transfer had occurred.

19. To support the view that the licence issued to Shalom Village was entirely distinct and separate from any that may have been in effect at SENH we need only refer to the language contained in the May 20, 1988 letter from Elinor Caplan the then Minister of Health to Mr. L. Price President of the Hamilton Jewish Home for the Aged which reads, in part:

Para 1. "I am pleased to advise you of my decision to *award* 60 nursing beds..." (emphasis added).

Para 5. "...The Ministry of Health undertakes to *grant* you a licence..." (emphasis added).

III The Hiring of SENH Staff

20. It is unequivocally clear to me that the evidence before the Board supports the respondent's and the Ministry's views that there was absolutely no requirement for Shalom Village to hire staff from the SENH. Further, there is an even more compelling case to be made that any "transfers" of such staff was never a condition of the bidding process, or the final award.

21. The majority of the Board, in paragraph 75 of its decision, concedes that while the MOH "wished" and "expected" the new licencees to take the SENH staff, it was not prepared to insist on anything more than that the licencees "consider" the SENH staff, and even that was not a condition of the award.

22. With the exception of internal MOH memos and letters, none of which were made available to Shalom Village, none of the documentation entered as evidence, including: the Ministry's August 6, 1987 letter to the St. Elizabeth Nursing Home Society (SENHS); the Ministry's August 18, 1987 letter to the SENHS; the September 11, 1987 Ministry's "News Release"; the Ministry's request for proposals published October 1, 1987; the Ministry's tender documents; the Ministry's May 20, 1988 letter to Mr. L. Price, Hamilton Jewish Home For The Aged; the Ministry's May 5, 1988 "News Release"; - makes any reference whatsoever to the hiring of staff from the SENH, but *is* concerned in every instance with the issuing of new licenses and the placement of residents. It is abundantly clear that the hiring of staff was never a condition of the issuing of the award of a licence to Shalom Village.

23. Why the respondent attempted, in the face of unequivocal evidence and testimony to the contrary, including that of Mr. Ron Sapsford - an eminently credible witness - to elevate the words "expect", "consider" and "interview" to the status of a legal and binding commitment, is disturbing, to say the least.

24. Paragraphs 36 and 37 of the majority decision refer to a meeting convened by Messrs. Sapsford and Baldry at which meeting Mrs. Borman of Shalom Village was present - no mention was made either before or during that meeting of the successor rights issue.

25. In paragraph 38 reference is made to the fact that Shalom Village was non-committal with respect to staff. One wonders why Mr. Baldry would not have pressed the issue of their "obligation".

26. As indicated in paragraph 41 of the majority decision Mr. Baldry "... informed the unions, S.E.N.H. employees and the general public ...". Significantly he did not inform Shalom Village that the MOH would help staff relocate.

27. A further meeting between Ministry representatives and the new licensees was held, as referred to in paragraph 47 of the majority decision - and once again there is no mention of successor rights or union representation.

28. If the obligation to take staff was in fact imposed upon nursing homes to whom SENH residents were assigned then why didn't Mr. Baldry require the three (3) "other" nursing homes to take staff? The attempt to explain this by saying that they already had staff is not acceptable - so did Shalom Village have existing staff for its other resident care interests.

29. In paragraph 75 the majority decision refers to a "lack of clarity..." with respect to the hiring of SENH staff and suggests that Shalom Village took advantage of this to minimize its commitment. This reference puzzles me as I believe that as outlined above this issue was very clear in

the minds of the principals of Shalom Village. They made no commitment nor indeed were they ever asked to make such a commitment to hire SENH staff and that it was not, in any respect whatsoever, a condition of the licence award.

30. A clear distinction must be made between the accommodation of residents and the placement of staff.

- a) The first official written indication of Ministry's position with regard to transfers was contained in Murray J. Elston's letter of August 18, 1987 (Minister of Health) to the St. Elizabeth Home Society in the fourth paragraph which reads, in part, "... the orderly transfer of *residents* to these facilities". (emphasis added).
- b) The September 1987 Ministry's News Release (Para. 5) until *residents* can be moved to the new accommodations..." (emphasis added).
- c) The October 1, 1987 newspaper advertisement inviting proposals for nursing home beds was restricted to just that - "*nursing home beds*" no mention was made of staff, let alone any requirement to hire them.
- d) At the October 13 public meeting those people in attendance, were informed according to Mr. Baldry, that the Ministry "... expected them to consider hiring the SENH employees".

This is the first recording of a direct instruction given to Mr. Baldry by his superior Mr. R. Sapsford in which the issue of staff was covered, and the clearly discretionary terms of "expect" and "consider" were employed.

- e) Paragraph 34 of the majority decision refers to the Ministry's offer to "... use its good offices" - surely such an offer would not be made if the respondent was obligated to take staff.
- f) The "obligation" to accept staff was significantly absent from the award documents because there was clearly no such obligation or condition.

31. A further indication that the Ministry did not have a commitment from Shalom Village (and the two other successful bidders) to transfer staff was the offering by the Ministry of a severance package to SENH employees.

32. Ultimately, Shalom Village interviewed everyone who applied, whether from SENH or elsewhere. Of the total number of employees hired at Shalom Village, 7 were from SENH. Those employees who were hired by Shalom Village who happened to have also worked for SENH previously, accounted for a significant minority of the total number of employees hired.

IV The Ministry of Health's Position with Respect to Union Representation

33. Here we have what I believe to be a rather critical issue. Mr. Baldry testified that he and others at the Ministry considered the status of the staff at the SENH following the Ministry take-over and they concluded that the staff were indeed civil servants and should properly be rep-

resented by a union other than the SEIU. Notwithstanding this Mr. Baldry decided “....we would not disclose this to the staff” and he continued to deal with SEIU Local 532, including the renewal of a collective agreement with a union, which to his clear knowledge and understanding did not have bargaining rights for the subject group of employees.

34. Neither Mr. Baldry nor the Ministry has the authority to decide the bargaining status of the employees which come under the Crown Employees Collective Bargaining Act (CECBA), and the decision taken by Mr. Baldry and his subsequent actions raises serious questions about the legality of the Collective Agreement and the right of the applicant to claim successor status. I expect that the SEIU President, Mr. Piersanti, given his long experience and his close association with Mr. Baldry, was well aware of the circumstances but chose, for reasons best known to himself, to ignore the important representation status issue.

V The Crown Transfers Act

35. The majority decision in Paragraph. 55 states that “...since it was common ground between the parties that SENH had become a Crown undertaking...” The parties agreed - and in my view this is all that they agreed to - that the Ministry clearly operated the former SENH - as indeed is required by Section 7 (1) and (2) of the HFSOA. In this respect I would suggest that the term “Crown undertaking” in these circumstances should not be given a significance beyond the Ministry’s mandate under the HFSOA”, and the ordinary meaning of the word “undertaking”.

36. There was clearly no transfer of anything or anyone from the Ministry to Shalom Village:

a) No personnel either management or bargaining unit employees were transferred.

b) No equipment or other physical facility was either sold or transferred from SENH to Shalom Village. This fact is uncontradicted.

c) No licence(s) was either sold or transferred. New licenses were unconnected in any direct manner with SENH issued to the three successful nursing homes following a formal bidding process. This fact is uncontradicted.

d) All of the personnel hired by Shalom village were required to apply for positions at that facility and were treated as new applicants - those people who formally worked for SENH and were hired by Shalom Village were new hires, not transfers from SENH. Shalom Village clearly had the right to accept or reject applicants. These facts are uncontradicted.

e) It is abundantly clear that there was no connection whatsoever between the SENH licence revoked by the Ministry - and the new licence issued by the Ministry to Shalom Village to accommodate the placement of SENH residents in other facilities. Indeed at the time that the licence was granted to Shalom Village there was no licence in existence for the SENH residents.

f) It is again in my view, abundantly clear that there was no transfer of a licence and no vendor or purchaser relationship between the SENH and the Ministry.

37. As noted in paragraph 49 of the majority decision we note that Mr. Sapsford did indeed

tell Shalom Village that successor rights did not apply. Shalom Village had every right to rely upon this statement considering its source. If Mr. Sapsford, in retrospect, believes that he was in fact giving a "personal opinion" this cannot diminish in any way the reliance placed upon that statement at the time it was made by him to Shalom Village.

38. The one overwhelming factor that distinguishes this case from other Crown Transfer cases cited in the majority decision is that the various Ministries, in those cases, operated the undertakings in their own right as owners or proprietors and they disposed of their assets and equipment through normal commercial transactions.

39. In paragraph 70 the majority decision states that "The fact that the licensed beds passed to Shalom Village by means of a request for proposals process rather than a direct commercial transaction is not particularly significant".

40. With the greatest respect I beg to differ - and as I stated earlier, the absolute separation of the SENH, its take-over by the Ministry, and the ultimate granting of new licenses under the Ministry bidding procedure is the crux of the whole matter.

41. The situation described in paragraph 68 of the majority decision is not relevant to this case. It refers to circumstances where, "... one operator agrees to surrender its licence on the condition that the other be granted a comparable one ...". In the case of the SENH the nursing home licence was revoked not surrendered.

42. Again, I would respectfully differ with the majority decisions comments in paragraph 86 and I would find that there were no relevant or pertinent links between SENH and Shalom Village with respect to the former's employees.

VI Sale of a Business

43. The applicant did not pursue their initial claim that a sale of a business had taken place between so the Board did not have to adjudicate this matter.

VII Timeliness of the Application

44. There was an inordinate delay between the time the SEIU became aware of the identity of Shalom Village as one of the three (3) successful bidders and its notice to Shalom Village of its claim to bargaining rights.

45. Evidence shows that Mr. Piersanti and Mr. Baldry were in personal and regular contact from the day (or the very next day) that the Ministry took over the operation of the SENH. It can be safely assumed from the nature of this close contact that Mr. Piersanti was made privy, by Mr. Baldry, to his decision with regard to the union representation rights matter. What possible explanation can there be as to why Mr. Piersanti maintained a low profile and did not make his "Crown Transfer" views known to Shalom Village until his letter to them of December 21, 1989, other than the fact that he did not want this Crown Employees Collective Bargaining Act matter to become an issue.

46. Shalom Village was advised by the Ministry in a letter dated May 20, 1988 that its bid for a licence was successful. In view of his close association with Mr. Baldry, Mr. Piersanti would surely have been aware of this but he chose to wait nineteen (19) months before notifying Shalom Village of his claim to union representation under the Crown Transfers Act.

47. Having tried, unsuccessfully, on two occasions to have a successor rights clause written

into the collective agreement, first with SENH and then with the Ministry there can be no acceptable reason for the inordinate delay in contacting Shalom Village on the successor rights issue.

48. I would find that the SEIU abandoned any right it might have had - I maintain that they had no right at all - by unnecessarily delaying notice to Shalom Village as to their claim. The applicant clearly sought to extend its bargaining rights rather than to preserve them, a proposition which has not met, in the past, with the Board's approval.

49. The lengthy delay by the applicant in attempting to assert its rights with respect to representation was clearly prejudicial to Shalom Village and the Board should exercise its discretion and dismiss the application. In testimony before the Board a member of Shalom Village's management stated that had they been aware of the claim, and after evaluating its potential for success, they could have considered withdrawing their bid for a licence, on the basis that the collective agreement that would accompany the SEIU could contain restrictive provisions which having been negotiated under different circumstances might not be compatible with Shalom Village's "Philosophy and Mission Statement".

VIII Summary

50. A dismissal of the application in no way deprives the employees of the right to be represented by a union of their choice - this they can do freely. There would be nothing to stop the SEIU from attempting to organize the employees at Shalom Village. If, as Mr. Piersanti testified, the SEIU represents the appropriate bargaining units "in most of the nursing homes" in the area, they obviously know what they have to do in this regard. The majority decision, in effect, gives special rights and privileges to the SEIU.

51. Most importantly the majority decision denies to the affected employees their legal right to choose to be represented or to not be represented by a trade union - a right unequivocally accorded to them by Section 3 of the Act.

52. The implication that arises from this decision, in my respectful view, is that the preservation of union bargaining rights takes precedence over the freedom to make a choice. Much is written in Board decisions about employee rights to organize when it is found that those rights have been denied or challenged by another party - it is ironic that the Board as guardian of the employees' right to choose denies them - in this instance - those very rights.

53. Another matter which causes me concern is the fact that the employees who will be affected by the majority decision were not given the usual Board notice of the application. The reason for this is that there were no employees working in the proposed bargaining unit at the time this application was filed. The Board has long held that parties who could be fundamentally effected by the outcome of a matter being adjudicated before the Board should be given notice and be permitted to participate in the hearing process. In this case that did not happen and the employees were denied the right to present their views had they wished to do so. This is one more reason why I support the use of the Board's discretion to order a vote.

54. It is important to note that quite apart from the serious deficiency of formal notice of the application not having been given the employees, union representation is being imposed on all those employees in what will become the Shalom Village bargaining unit despite the fact that the number of former SENH bargaining unit employees hired by Shalom Village likely represent under 20% of the subject group. Surely this facet alone warrants the exercise of the Board's discretion to order a representation vote.

55. In conclusion, I would dismiss the application outright, alternatively, I would have the Board exercise its discretion and order a representation vote in order that the affected employees will be permitted to participate directly, as is their right, in this important aspect of their lives.

2732-91-R Canadian Union of Operating Engineers and General Workers, Applicant v. Simcoe County Association for the Physically Disabled, Respondent

Bargaining Unit - Certification - Union seeking bargaining unit of full-time employees - Employer taking position that full-time and part-time employees should be in the same unit - Board observing that since *Hospital for Sick Children* case, Board focusing on applicant's bargaining unit, in the absence of serious labour relations problems to the employer - Board finding full-time bargaining unit appropriate

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and C. McDonald.

APPEARANCES: Melissa J. Kronick and Zoran Grgar for the applicant; Joseph N. Tascona and Kim Dancavitch for the respondent.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER C. MCDONALD: July 15, 1992

1. These are the reasons for the Board's decision dated February 28, 1992, which decided that the bargaining unit should be composed only of full-time employees, as requested by the applicant, rather than of both full-time and part-time employees as requested by the respondent.
2. The employer took the position that to prevent undue fragmentation and to respect lines of community of interest, the full-time and part-time employees should be in the same bargaining unit. The employer noted that the applicant's original application asked for an "all employee" bargaining unit. However, subsequent to that, but before the officer's meeting concerning the pre-hearing vote held in this matter, the applicant informed the employer that it wished to have the part-time employees excluded from the bargaining unit. The applicant's position is that it is the Board's practice to exclude part-time employees at the request of either party. Therefore, the applicant maintained that there was an onus on the respondent to show that the full-time and part-time employees share a community of interest which the applicant maintains they do not.
3. The employer called Kim Dancavitch, Executive Director, Simcoe Association for the Physically Disabled as a witness. Her evidence was basically uncontradicted; the union called no evidence. That evidence disclosed that the drivers who are the subject matter of this decision performed essentially the same services for the respondent, regardless of whether they are full or part-time. The main difference between the two is that the full-time employees work more hours and the part-time employees all have full-time employment elsewhere. A more detailed summary of her evidence follows.
4. The respondent provides a number of services for the physically disabled in the Barrie area. The Barrie Accessible Community Transportation Service (BACTS) provided by the drivers in the bargaining unit sought is one of those services and is considered a separate department of the organization. There are four full-time and six part-time drivers in the BACTS program. All

these drivers are scheduled by the employer through its head-office and communicated with at the garage, which is some distance away from the head office, by way of written schedules and memos. Both full-time and part-time drivers report to the Transportation Manager.

5. All drivers serve six-month probationary periods and a six-month waiting period for benefits. Both groups are paid the same hourly wage and move through the wage grid at twelve-month intervals depending on performance and recommendations of their Managers. Performance evaluations are carried out annually for both full-time and part-time drivers. The benefit plan, while the same for full-time and part-time drivers, is somewhat different than for the other employees of the employer. Both full-time and part-time employees accumulate vacation entitlement at the same rate, paid at 4 percent of gross pay.

6. All drivers are required to submit log sheets on a daily basis of the hours worked for the employer, giving a detailed breakdown of the services performed. Both full-time and part-time drivers are booked a substantial amount of time in advance, the schedule being made up monthly. Part-time drivers are apt to work between 4:30 and 11:00 p.m. Monday to Friday and 9:00 a.m. to 11:00 p.m. on Saturdays whereas full-timers normally work a forty-hour day shift between Monday and Friday. It was estimated that part-timers average about 20 hours a week. Both full-time and part-time drivers may be assigned extra shifts if they wish as the need arises. Overtime entitlement is computed on the same thresholds for full-time and part-time. Part-time employees are used to replace full-time employees if they are sick, on vacation, or if there is a vacancy in a full-time position which is as yet unfilled. Full-time drivers are required to apply for vacancies in the part-time positions and vice-versa, and there has been movement back and forth between the two groups.

7. There are two other groups of employees in the employ of the respondent. First are attendant care-workers who are hourly paid workers who give physical support services to disabled clients in residential or community outreach programs, approximately nine full-time and twenty-seven part-time. There are also two driver/dispatchers, one full-time and one part-time.

8. The employer asked for a single unit to avoid the risk of work disruption which it says would be caused by having a multiplicity of bargaining units in such a small employment situation. Counsel asked us to consider BACTS an essential service to the physically disabled and to consider that there exists a strong community of interest between the full-time and part-time drivers and none with the rest of the hourly workers. Therefore the employer submits a single "all employee" unit should be the appropriate unit.

9. The union characterizes the issue as whether or not the union's requested bargaining unit is *an* appropriate unit, not whether it was *the most* appropriate unit. As to community of interest, the union argues that the single most important factor is that all of the part-time employees have full-time employment elsewhere which puts them into a very different category as to community of interest, with different needs for collective bargaining.

10. Employer counsel referred us to *Emergency Health Services Commission and CUPE, Local 873*, 6 CLRBR (2d) 111, a decision of the British Columbia Industrial Relations Council. In that case, an application by the union for certification of ambulance drivers and attendants, the panel had to decide the appropriate bargaining unit. The existence of a divergence between the interests of part-time and full-time drivers was not considered to be so extensive as to create a barrier to a single bargaining unit. The panel spoke of the need to minimize the risk of industrial disruption among the employees of a public sector employer such as health services. Although there are similarities between the facts in our case and the case cited, it is clear from the Industrial Relations Council's reference to the decision in *Insurance Corporation of British Columbia, supra*, (1974) 1 CLRBR 403 (BC) June 12, 1974 that the considerations relied on are very specific to the

B.C. policy on public service units, not one found in a similar form in the different statutory structure in Ontario.

11. We were also referred to the *Geri-Care Nursing Home of Caressant Care Limited*, [1986] OLRB Rep. Oct. 1338, a decision that concluded that notwithstanding the fact that two groups of part-time employees employed in a related rest-home and nursing home shared a community of interest, they should be in separate bargaining units to mirror the configuration of the full-time bargaining unit. This case is not of assistance to the Board in this matter, and if anything, supports the division between full-time and part-time. We were also referred to *Chateau-Laurier Hotel*, [1988] OLRB Rep. Feb. 119 where the Board departed from its normal practice of separating full-time and part-time and awarded a single bargaining unit of full-time and part-time banquet employees. That case reflected the very particular circumstances of a group of banquet workers who were part-time in regards to several different hotels and employed on an on-call basis. The Board found at paragraph 11:

... the facts point to a single, relatively amorphous group of employees who share a community of interest based upon common terms and conditions of employment, highly-variable hours of work, great flexibility in accepting and rejecting "calls", and a relatively limited allegiance to the respondent.

The Board also considered that the applicant had not relied on the Board's normal practice in organizing the two groups, since it had initially applied for a bargaining unit composed of all of the respondent's banquet department employees without an exclusion of part-time employees and students. On those facts the Board was satisfied that the rationale which supports the general exclusion of part-time employees, at the request of either the applicant or the respondent, was inapplicable on the facts of that case.

12. Also referred to by the respondent was *Kehl Tools Ltd.*, [1991] OLRB Rep. April 517. In that case, as opposed to all of the others argued by the respondent, it was the applicant who wanted a single unit and the respondent who wanted it divided into part-time and full-time. This was a very specific fact situation involving a temporary work-share program among individuals who were otherwise full-time employees, designed to avoid the lay-offs of some of its otherwise full-time employees. In that circumstance the Board did not accede to the employer's request. Other than during the work-share program, there was no history of employing part-time employees. That case really turned on the normal practice of the Board to avoid "notional" bargaining units, i.e., to not create a part-time unit where there is no history of employing part-time employees.

13. In the *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713 the Board elaborated on the reasons for the Board's normal practice of excluding part-time employees on the request of either party. In that case the Board found that the fact of common terms of employment between full-time and part-time employees did not address the Board's historical view that there are different appetites for collective bargaining between part-time and full-time employees due to their different levels of attachment to the work force. In coming to this conclusion it cited *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330 where it was explained that the Board's practice concerning part-time employees is not only a policy designed to avoid difficulties which may arise when groups with little community of interest are included in a single bargaining unit but is also an organizing rule to promote the public interest in furtherance of harmonious labour relations. We find the arguments put before us to be very similar to those in *Board of Education for the Borough of Scarborough* and *Toronto Airport Hilton*. See also more recently, *Vaughan Public Libraries*, [1989] OLRB Rep. Dec. 1282.

14. Since the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board has made

it plain that there are many cases in which there is more than one bargaining unit configuration that can be considered appropriate. It suggests a focus on the applicant's bargaining unit, in the absence of serious labour relations problems to the employer. The evidence does not disclose such factors. Having an organized unit of full-time drivers side by side with an unorganized group of part-time drivers and driver/dispatchers is not the kind of fragmentation that is of sufficient concern to deny the applicant an otherwise appropriate unit. There is nothing that we find inappropriate about the applicant's requested unit. It is also consistent with the Board's normal practice, which developed out of important labour relations considerations, including predictability for the labour relations community.

15. Therefore, having regard to the partial agreement of the parties and the above considerations, the Board found that

all employees of Simcoe County Association for the Physically Disabled employed as drivers in the County Simcoe, save and except supervisors, persons above the rank of supervisor, office and clerical staff, dispatcher/drivers and persons regularly employed for not more than twenty-four (24) hours per week.

was a unit of employees appropriate for collective bargaining and certified the applicant.

DECISION OF BOARD MEMBER J. A. RONSON; July 15, 1992

1. Since the only difference between full-time and part-time drivers is the number of hours they work, I would have ordered that there be but one bargaining unit for all the drivers employed by the Respondent employer.

2. For those who are interested, an over-view of the Board's present approach to the scope of a proposed bargaining unit may be obtained by reading the decisions in the following Board files:

Motor Coach Industries Limited - File No. 2721-90-R

The Hostess Frito-Lay Co. - File No. 3807-91-R

1346-90-R; 1347-90-R; 1617-90-U; 1830-90-U Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Steinberg Inc. (Miracle Food Mart Division)** and The Great Atlantic and Pacific Company of Canada Limited, Respondents v. Retail, Wholesale and Department Store Union, AFL CIO CLC, and its Local 414, Intervener; R. Carniel et al, Complainant, v. Steinberg Inc. (Miracle Food Mart Division) and The Great Atlantic and Pacific Company of Canada Limited, Respondents; Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Steinberg Inc. (Miracle Food Mart Division) and The Great Atlantic and Pacific Company of Canada Limited, Respondents

Adjournment - Practice and Procedure - Sale of a Business - Stay - Unfair Labour Prac-

tice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

BEFORE: Susan Tacon, Vice-Chair, and Board Members G. O. Shamanski and R. R. Montague.

APPEARANCES: J. James Nyman and Robert McGibbon for the applicant/complainant in Board Files 1346-90-R, 1347-90-R and 1830-90-U; Paul Jarvis for Steinberg Inc.; D. J. Shields, H. Freedman and Tom Zakrzewski for the Great Atlantic and Pacific Company of Canada Limited; Susan Ballantyne, B. Hanson and Robert McKay for the intervener in Board Files 1346-90-R and 1347-90-R; David Moore and Michael Battista for the complainant in Board File 1617-90-U.

DECISION OF THE BOARD; July 28, 1992

1. Board Files 1346-90-R and 1347-90-R are applications pursuant to section 63 (now section 64) and 1(4) of the *Labour Relations Act*. Board Files 1617-90-U and 1830-90-U are complaints pursuant to section 89 [now section 91] of the Act. The Board commenced its hearing in these matters in October 1990. By June 1992, there had been over twenty-five days of hearing and a number of written interim orders and rulings dealing with various issues. It appeared that the remaining dates scheduled in June 1992 would complete the evidence and submissions of the parties. When the Board reconvened on June 2, 1992, counsel for the respondent Steinberg indicated that an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A.") had been signed by Judge Denis of the Quebec Superior Court on May 31, 1992, the effect of which, it was asserted, was to stay the instant Board proceedings.

2. The Board heard full submissions with respect to the impact of the court order, if any, on the Board's proceedings as against the respondent Steinberg and as against the respondent A&P, including representations as to whether, if the Board could proceed in some fashion against Steinberg and/or A&P whether it should do so. The able and thorough submissions of counsel are set in summarized form. Counsel for the intervener RWDSU (Mr. Hanson on the day in question) did not make submissions. It should also be noted that Mr. Freedman made submissions on behalf of A&P with respect to this matter.

3. Counsel for Steinberg submitted that the words of the C.C.A.A. in section 11 are very broad, reflecting the broad remedial intention of the legislation. The C.C.A.A. was designed to create a "cocoon", in effect, around a company for a brief period of time to permit an opportunity for restructuring and preservation of the company as an ongoing concern, if possible. Moreover, the court order itself (in items 14, 15 and 16) is broadly phrased. On their face, both the statute and the court order apply to Board proceedings. Further, it was argued that the courts, in interpreting the legislation and, in particular, the word "proceedings" in section 11 of the C.C.A.A. encompassed far more than judicial proceedings, narrowly defined, and far more than creditors. Counsel asserted that, unless the Board was certain the court order has no application herein, the Board should stay these proceedings, especially as the implication of interpreting the court order incorrectly is contempt. In counsel's view, the proper course of action for the individual complainants and the Teamsters is to seek from the Judge of the Quebec Superior Court who issued the order a modification of the court order to permit the Board proceedings to continue. Counsel acknowledged that Steinberg did not disclose the existence of the instant Board proceeding in the

material filed in respect of the court order obtained by Steinberg on an ex parte basis. It was contended, however, that it was not for the Board to second guess the judge as to whether he intended that these proceedings should be caught by the court order. The proper route to clarify that question was a motion before Judge Denis. Counsel also acknowledged that he had no instructions to facilitate a motion by the individual complainants and/or the Teamsters seeking modification of the court order. It appears (and was not disputed) from communications between the individual complainants and the Quebec firm of Langlois Robert acting for Steinberg and the coordinator appointed by the court that both Steinberg and the coordinator would, at this point, oppose any modification in the order which would permit the Board proceedings to be completed. Cases referred to included: *Quintette Coal Limited v. Nippon Steel Corporation et al* [1990], 51 B.C.L.R. (2d) 105 (B.C.C.A.); *Norcen Energy Resources Limited and Prairie Oil Royalties Company Ltd. v. Oakwood Petroleums Ltd.* (1988), 63 Alta. L.R. (2d) 361 (Alta. Q.B.).

4. Counsel for A&P adopted the submissions of counsel for Steinberg with respect to the broad remedial purpose of the statute and the effect of the court order on these proceedings. Further, counsel submitted that the C.C.A.A. is legislation whose validity has been upheld and, by virtue of the doctrine of paramountcy, overrides to the extent necessary to give effect to the legislation provincial authority in section 92(12) of the *Constitution Act*. It was argued the caselaw had clearly given a broad reading to the term "proceedings" to include quasi-judicial processes, a set-off flowing from a prior arbitration, sheriff's seizure, for example. Board proceedings were clearly caught by the term. Counsel submitted that the C.C.A.A. precluded enforcement (for the term of a stay order) of other statutory rights. Counsel agreed with counsel for Steinberg that the proper route for the individual complainants and the Teamsters is for those parties to seek a modification of the stay order before the Judge issuing the original order. Counsel also contended that, should the Board agree that proceedings were stayed as against Steinberg because of the court order, the Board should likewise stay proceedings as against A&P. That is, it was inappropriate, improper and unfair to proceed against A&P alone given that the matter thus far had been treated as one proceeding. It was argued that the complainants would have had the benefit, in their case against A&P, of Board orders directing Steinberg to produce documents and witnesses which would not have occurred had the matters been considered separately. Counsel asserted the Board should neither sever the instant proceedings nor grant to the individual complainants and the Teamsters leave to withdraw against Steinberg. Counsel also noted that, since A&P would be seeking indemnification against Steinberg on the basis of their contract if A&P was found in breach of the *Labour Relations Act*, that prospect provided a further reason for staying the present proceedings in their entirety. Cases cited in support included: *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. 109 (Alta. Q.B.); *Hong Kong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 307 (B.C.S.C.), aff'd [1991] 2 W.W.R. 136 (B.C.C.A.); *Quintette Coal Limited v. Nippon Steel Corporation et al* (1990), 47 B.C.L.R. (2d) 193 (B.C.S.C.), aff'd (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A.); leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164; *Norcen Energy Resources Ltd. et al v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. 1 (Alta. Q.B.); *Ptarmigan Airways Ltd. v. Federated Mining Corporation*, [1973] 3 W.W.R. 723; *Re Philip's Manufacturing Ltd.* (unreported, B.C.S.C., October 17, 1991); *Dunn v. The Board of Education for the City of Toronto*, [1904] 7 O.L.R. 451; *Reference Re: The Companies' Creditors Arrangement Act*, (1934), 16 C.B.R. 1 (S.C.C.).

5. Counsel for the Teamsters submitted that the Board had the jurisdiction and the responsibility to interpret the ambit of the C.C.A.A. and the court order. Given the remedial purpose of the C.C.A.A., it was argued that the C.C.A.A. and the order which mirrored and was a product of the statute did not have any impact on the Board proceedings in the instant case. Counsel did not disagree that the courts have interpreted the term "proceeding" broadly but contended that definition is limited to the commercial context. That is, the cases cited have concerned situa-

tions where to grant the leave requested - whether by creditor or other non-creditor in a judicial or other proceeding - would have the effect of putting the protected company out of business (at least for practical purposes) or would give the claimant an advantage over others vis-a-vis the protected company's assets. The Board was free, it was asserted, to interpret the C.C.A.A. and the court order in the context of this specific fact situation including the remedial nature and purpose of the *Labour Relations Act*. In counsel's view, the purpose of the C.C.A.A. would not be undermined by continuing with the instant Board proceedings unless and until the Board ordered monetary relief for a breach of the *Labour Relations Act* and the parties sought execution or enforcement of the Board order. Counsel also asserted that the Board may well have a discretion as to whether to proceed and the balance of convenience in the circumstances favoured continuing with the instant case rather than requiring the individual complainants and the Teamsters to appear before the Judge in Quebec who issued the order to seek a modification of the stay order. Counsel distinguished those cases referred to by counsel for Steinberg and for A&P on the ground that the jurisprudence was confined to the commercial context, as noted. In the alternative, counsel argued that any stay should operate only as against Steinberg. The matter should continue against A&P as that company was not entitled to protection under the C.C.A.A. and should not benefit from an order granted to Steinberg under that Act. Counsel acknowledged that a stay only with respect to Steinberg might create practical problems as to the manner of proceeding but such difficulties, it was suggested, were not insurmountable. In that regard, counsel submitted that there was no remedy claimed in the section 64 application against Steinberg and, therefore, no prejudice to Steinberg in proceeding against A&P. And, the section 91 complaints against Steinberg could be severed and heard following the expiration of the stay. In the further alternative, counsel submitted that the individual complainants and the Teamsters had the right to withdraw against Steinberg and, should such a leave be requested of the Board, that should be granted. Cases cited: *Guardian Trust Co. v. Gaglardi* (1989), 64 D.L.R. (4th) 351 (B.C.S.C.); *Fine's Flowers Ltd. v. Fine's Flowers Ltd. (Creditors)* (1992), 87 D.L.R. (4th) 391 (Ont. S.C.); *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219.

6. Counsel for the individual complainants submitted that the term "proceedings" is ambiguous and that ambiguity should be resolved in a manner which advanced the statutory objectives of the C.C.A.A.. Counsel added that, in the current economic times, it was likely that resort to the C.C.A.A. would be more frequent and, accordingly, it was important for the Board to decide the impact of the C.C.A.A. on Board proceedings. The submissions of counsel for the Teamsters regarding the purpose and interpretation of the C.C.A.A. were adopted. Further, it was asserted that, given the underlying statutory purpose, the instant Board proceedings were not caught by the court order. Counsel ordered that the caselaw wherein the C.C.A.A. was interpreted broadly was confined to the commercial context and, further, that the Board proceedings could continue at least until the parties sought enforcement of a Board order directing monetary relief against Steinberg. Counsel quite properly brought two cases to the attention of the Board which did not support his position but argued both were both distinguishable and/or should not be followed as the courts therein did not expressly address the competing policy concerns of the *Labour Relations Act* or the arguments raised herein were not apparently made before those courts. (*International Woodworkers of America, Local 1-324 v. Wescana Inn Ltd. and Clarkson Company Limited* (1977), 27 Can. Bankruptcy Reports 201 (M.C.A.); *Paul Bertrand and Line Gagnon*, [1980] 3 Can. LRBR 316). It was argued that the Board should take into consideration the expense and difficulties associated with requiring the individual complainants and the Teamsters to seek a modification of the stay order before the Quebec court. The contempt issue was irrelevant to the Board's assessment. In the alternative, if the Board concluded the term "proceedings" could apply to the Board hearings, nonetheless the Board should interpret the C.C.A.A. as not applicable herein given the context of the material filed in support of Steinberg's ex parte application to the court which did not refer to the complainants herein nor disclose the instant pro-

ceedings. That is, it was argued that Steinberg did not intend and the Judge could not have intended the instant proceeding to be caught by the stay order. In the circumstances, and given the absence of any specific reference to the instant proceeding in the stay, counsel submitted that Steinberg bore an onus of demonstrating to the Board that this proceeding was intended to be caught and had not satisfied that onus. Counsel adopted the submissions of counsel for the Teamsters with respect to the right of the complainants to withdraw as against Steinberg and that A&P was not entitled to any protection under the C.C.A.A. nor should it benefit from the stay order. In effect, in the further alternative, the Board could continue the hearing as against A&P and stay the proceedings against Steinberg until the stay order expired. Also referred to: *Guaranty Trust Co.* (1947), 47 CLLC ¶16,500.

7. In reply, counsel for A&P submitted that the term “proceedings” was not ambiguous but, rather, had been interpreted broadly by the courts. It was submitted that there was no basis in the wording of the statute or the court order for the Board to proceed to conclude the case and stop only at the point of execution of the remedy if a breach of the *Labour Relations Act* was found and relief ordered. Nor should any weight be given, counsel argued, to any potential procedural or practical difficulties faced by the individual complainants and the Teamsters in seeking a variation of the court order. That is, the question is one of interpretation of the order and the C.C.A.A., not expediency, and with respect to that question of interpretation, there was no issue of onus. Counsel also commented on several cases cited by counsel for the complainants and/or counsel for the Teamsters, submitting that the cases did not support the conclusion that the Board could proceed in the instant matter.

8. In reply, counsel for Steinberg agreed with counsel for A&P that the question was one of interpretation to which no onus attached to any party and that the C.C.A.A., the court order and caselaw draw no distinction between proceedings to establish liability and enforcement or execution. With respect to whether the Board could proceed as against A&P alone, counsel submitted that to do so would be improper, given the requirements of procedural fairness, unless the complaints against Steinberg were entirely withdrawn and it was clear that no relief was sought against Steinberg in the section 64 application. That is, in the context of the pleadings as drafted, counsel submitted that Steinberg was entitled to participate in a proceeding against A&P if there was any prospect that proceedings against Steinberg could be reactivated. Should there be a withdrawal of the complaints against Steinberg and clarification that no relief was sought against Steinberg in the section 64 application, counsel made no submissions with respect to whether the Board should proceed against A&P alone.

9. It is appropriate to begin the Board’s analysis by setting out the relevant sections of the C.C.A.A. and the court order issued with respect to Steinberg, the petitioner under the C.C.A.A. and one of the respondents in the Board proceeding.

C.C.A.A.

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit.

- (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
- (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

- (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes. R.S., c. C-25, s.11.

• • •

16. Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it. R.S., c. C-25, s.16.

17. All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions. R.S., c. C-25, s.17.

COURT ORDER (English translation)

14. SUSPEND all the proceedings instituted or that may be instituted against the Petitioner pursuant to any law of general application, contract, agreement or accord of any nature, as well as any proceedings pursuant to the Bankruptcy Act and the Winding-up Act or one or the other of these acts, until the sanction of the final plan of arrangement or until a new Order of the Court or with leave of the Court, upon a motion to such effect, served on the Petitioner, in the care of its attorneys, Langlois Robert, and including a notice of presentation providing at least two (2) clear legal days notice, and under the conditions that the Court may impose, the whole until a new Order of the Court in the matter;

15. RESTRAIN any further proceedings in any action, suit or proceeding already instituted against the Petitioner under such conditions as may be deemed opportune by the Court or with leave of the Court upon a motion to such effect, served on the Petitioner, in the care of its attorneys, Langlois Robert, and including a notice of presentation providing at least two (2) clear legal days notice, and under the conditions that the Court may impose, the whole until a new Order of the Court in the matter;

16. ORDER that no action, suit or other proceedings be proceeded with or commenced by anyone against the Petitioner, except with leave of the Court, upon a motion to such effect, served on the Petitioner, in the care of its attorney, Langois Robert, and including a notice of presentation providing at least two (2) clear legal days notice and subject to such conditions as the Court may impose, the whole until a new Order of the Court in the matter;

• • •

10. There was no dispute that the Board has the jurisdiction to interpret the C.C.A.A. and the court order in the context of their impact on the instant proceeding. It was also acknowledged that the C.C.A.A. is valid federal legislation under section 91(21) of the *Constitution Act* (Reference Re: *The Companies' Creditors Arrangement Act*, *supra*). A useful exposition of the approach of the judiciary to the interpretation of the C.C.A.A. is found in *Quintette Coal Ltd.*, *supra*, at pp 109-111 and 112-113, wherein the British Columbia Court of Appeal sketches the historical setting of the C.C.A.A. as well:

The starting point in the construction exercise is an understanding of the historical setting of the C.C.A.A. to the end that s. 11 is read in such a manner as to achieve the object of Parliament. Maxwell speaks of the historical setting as an aid to construction at pp. 47 and 48:

"The Court" said Sir George Jessel M.R., "is not to be an oblivious... of the history

of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgements tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended." In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject-matter, and may also consider whether a statute was intended to alter the law or to leave it exactly where it stood before. But although "we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge... we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act."

In *Chef Ready Foods Ltd. v. Hongkong Bank of Can.*, Vancouver No. CA12944, judgement handed down on 29th October 1990 [now reported ante, p.84], another division of this court reviewed the historic background of the C.C.A.A. saying, at pp. 10 and 11 [p.91]:

The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. to create a regime whereby the principles of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

The court then quoted excerpts from an article by Stanley Edwards (1947), 25 Can. Bar. Rev. 587, entitled "Reorganizations Under the Companies' Creditors Arrangement Act" which, it said, "explain very well the historic and continuing purposes of the Act" [pp.91-92]:

"It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders."

Page 590:

"There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of committing dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past."

"Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations."

• • •

The other aid to construction which is appropriate here is the view other courts have taken of s. 11. Maxwell at p.47 (see above) quotes Sir George Jessel M.R. as saying, *inter alia*:

"... when... prior judgements tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."

Considering that the C.C.A.A. was enacted some 57 years ago there are relatively few reported cases interpreting its provisions. That may be a reflection of the general level of prosperity, with some short term reverses, which has been the Canadian experience for the past 50-plus years. In any event, and whatever the reason, the reported cases indicate that the courts have tended to avoid microscopic parsing of the words and phrases of s. 11 in favour of a broader "purposes" perspective thereby reaching conclusions held to further the objectives of Parliament. Without so stating they have given full effect to the direction in s. 12 of the Interpretation Act, R.S.C. 1985, c. 1-21:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The following cases are illustrative of the kind of conduct the courts have found to be within their power to restrain under s. 11: *Re Feifer and Frame Mfg. Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Can. Inc. v. Gaz Metropolitan Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 63 Alta. L.R. (2d) 361, 72 C.B.R. (N.S.) 1, 92 A.R. 81 (Q.B). The judgements also contain helpful and persuasive observations about the intent and purpose of the Act, as do the following judgments: *Meridian Dev. Inc. v. T.D. Bank*; *Meridian Dev. Inc. v. Nu-West Ltd.*, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.); *Re Ursel Invt. Ltd.*, Sask. Q.B., 1990 (not yet reported); and *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.*, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195 (C.A.). And in his judgement in this case Thackray J. adopted the approach followed in *Meridian* and *Norcen*. There is a perceptive observation about the attitude of the courts at the end of the case comment following the C.B.R. report of *Norcen*:

The *Norcen* decision is one of the strongest examples to date of the willingness of the courts to permit the C.C.A.A. to be used as a practical and effective way of restructuring corporate indebtedness.

By way of brief summary, the subject matter of each of the judgments which has a direct bearing on the scope of s. 11 is as follows: in *Feifer and Frame*, a notice of eviction by the landlord; in *Wynden Can.*, cessation of utility services; in *Meridian*, a letter of credit; in *Norcen*, a replacement of the operator under an oil and gas operating agreement.

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially.

11. There was no dispute, as well, that the jurisprudence sustains a broad interpretation of the word “proceedings” in section 11: see *Meridian Developments*, *supra* at pp 113-114 and 117-118 and *Chef Ready Foods*, *supra* at pp 140 and 142-144 where the courts therein comment on the purpose and wide ambit of the C.C.A.A. in various contexts. A few examples will suffice herein. Stay orders under the C.C.A.A. have restrained extra-judicial conduct including a set-off (*Quintette*, *supra*). The courts have not restricted the orders issued pursuant to the C.C.A.A. to creditors: *Norcen Energy Resources*, *supra*. A landlord was not permitted to rely on an eviction clause where a debtor tenant obtained protection under the C.C.A.A.: *Re Feifer and Frame Mfg. Corp.*, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.). Parties seeking to rely on statutory rights have likewise been precluded from continuing or instituting an action or proceeding in the face of a stay order under the C.C.A.A.: *Vachon v. Can. Employment & Immigration Comm.*, [1985] 2 S.C.R. 417, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 63 N.R. 81; *Ptarmigan Airways*, *supra*; *Re Chef Ready Foods*, *supra*.

12. This is the first instance where the issue of the applicability to Board proceedings of the C.C.A.A. and a stay order issued thereunder has been squarely raised. The reasoning in *Guaranty Trust Co.*, *supra*, is not of assistance given the precise wording of the order at issue therein. Nor did the Board have to deal directly with a similar statute, the *Bankruptcy Act*, R.S.C. 1970, c. B-3, in the circumstances in *Roy Brandon Construction*, *supra*. In *Chandelle Fashions Ltd.*, [1981] OLRB Rep. Sept. 1191, the Board, having already found a breach of the *Labour Relations Act*, quantified that liability in the face of a stay order under the *Bankruptcy Act*. The Board distinguished between the decision to quantify the liability and the ability of employees to execute or enforce the Board’s order. However, as that decision expressly notes, no one appeared on behalf of the trustees in bankruptcy to address the issues or direct the Board’s attention to any judicial authority as to whether the quantification of liability itself was restrained by the stay order. Those cases, then, are not of assistance to the Board in determining the question of the ambit of the C.C.A.A. and the stay order.

13. Counsel for the individual complainants and for the Teamsters urged the Board to find that the purpose of the C.C.A.A. was to preserve a company’s assets and operating ability in the commercial context and to interpret the term “proceedings” in that context so as to conclude that the C.C.A.A. and the stay order have no applicability to the instant proceedings. Notwithstanding their eloquent submissions, the Board is not persuaded of the correctness of that conclusion. In the Board’s view, the language of the C.C.A.A. and the stay order does encompass, on its face, the Board’s adjudicative process. This is so notwithstanding the remedial nature of the *Labour Relations Act*, the importance and uniqueness of the rights created under that Act and the Board’s role in ensuring those rights are upheld in furtherance of the statutory objectives. To find otherwise, would be to do violence to the wording of the C.C.A.A. and the stay order. The broad interpretation consistently accorded the C.C.A.A. by the courts further sustains the Board’s determination in this regard. Nor does the Board agree that the wording of the C.C.A.A. and the stay order admit of a distinction between continuation of proceedings with respect to establishing liability and subsequent enforcement or execution of remedial orders. While such a distinction has some attractiveness, the Board does not regard that proposition as sustainable in the face of the language of the C.C.A.A. and the stay order and the jurisprudence.

14. Beyond the judicial references already discussed, there are two instances properly brought to the Board's attention by counsel for the individual complainants which constitute additional support for the Board's conclusion that the instant proceedings are caught by the stay order. In *International Woodworkers of America, Local 1-234 and Wescana Inn Ltd. and Clarkson Company Limited, supra*, the Manitoba Court of Appeal expressly held that the term "proceedings" in the receivership order embraces a proceeding before the Manitoba Labour Board to obtain certification (at p 206). The differences between the matter before the Court of Appeal and the Manitoba Labour Board and the instant proceedings are not material. While not legally binding, the reasoning of the Manitoba Court of Appeal is compelling and buttresses a conclusion in this case that the stay order issued under the C.C.A.A. restrains these proceedings (see also *Paul Bertrand, supra*).

15. It is the conclusion of the Board that the individual complainants and the Teamsters must be content to have the proceedings await the expiration of the stay order or must seek a variation of that order to permit the instant proceedings to continue as presently constituted. In that regard, the Board notes the acknowledgement by counsel for Steinberg that these proceedings were not disclosed to the court issuing the ex parte order nor referred to in the materials filed by Steinberg in support of the application under the C.C.A.A.. The duty to make full and frank disclosure of all material facts in seeking an ex parte order was noted by counsel for the individual complainants: see also *Philip's Manufacturing Ltd. supra*. It was asserted that Steinberg either did not intend the Board proceedings to be caught by the stay order or concealed the existence of the instant complaint and the stage the proceedings had reached. The Board need not decide if either proposition is correct although the Board is troubled by the lack of disclosure. Nonetheless, the language of the C.C.A.A. and the court order and the jurisprudence have led the Board to conclude that these proceedings are embraced by the order. Steinberg's position is that, notwithstanding the lack of disclosure in the ex parte application, the Board proceedings are caught by the stay order, the individual complainants and the Teamsters must seek a variation in the order in the Quebec courts (before the Judge issuing the original order) and any modification in the order to permit these proceedings to continue will be opposed. Those matters are ultimately for the court to consider if the individual complainants and the Teamsters do seek such a variation.

16. In reaching its decision, it is unnecessary for the Board to determine whether a variation in the stay order must be brought before the Judge who issued the original order or simply before the same court in Quebec, nor is the Board commenting on whether the individual complainants and the Teamsters could seek a variation of the stay order before the Ontario courts given the provisions of sections 16 and 17 of the C.C.A.A. Those are matters for the parties to assess and for the courts to decide.

17. The Board then turns to the question of whether the proceedings may be severed so as to permit the continuation of the application and complaints against the respondent A&P. The respondent A&P is not entitled to protection under the C.C.A.A.: *Guardian Trust Co., supra*. Nor should proceedings be stayed as against Steinberg on the basis that A&P would seek indemnification from Steinberg on their contract should A&P be found to have breached the *Labour Relations Act: Meridian Developments Inc., supra*. Whether the allegations against A&P should be stayed because of the manner in which the complaints/applications have proceeded thus far is more problematic. The Board determined at the commencement of the case that, given the overlap in evidence and the nature of the allegations against Steinberg and A&P, it would be most expeditious and appropriate to hear all matters together. At the point the stay order issued, the Board had yet to hear from two witnesses on behalf of the individual complainants. It appeared likely that the Teamsters would not be calling any witnesses. That would leave reply evidence, if any, by A&P and Steinberg respectively and submissions from all parties on all issues. In the Board's view, it is

not possible to disentangle the proceedings to permit the matter to continue against A&P and to be stayed against Steinberg with the prospect of resurrecting the case against Steinberg when the court ordered stay is lifted or varied to exclude the instant case from its ambit. Counsel for the individual complainants and the Teamsters acknowledged that there would be practical difficulties in so severing the proceedings but argued those difficulties were not insurmountable. The Board does not agree given the manner in which the allegations in the section 91 complaint against Steinberg have been framed and the dictates of natural justice. In the Board's opinion, the case against A&P can continue (absent a variation in the court order excluding the instant proceeding entirely from the reach of the order) only if the individual complainants and the Teamsters together withdraw their section 91 complaints against Steinberg and stipulate that no relief against Steinberg is sought in the section 64 application. In this regard, the Board notes that, while the applications as initially filed included a reference to section 1(4) of the *Labour Relations Act*, that aspect was not the subject of submissions and has apparently not been pursued.

18. Counsel for A&P submitted that the Board should not grant such leave to withdraw, if so requested, because those parties had the benefit of Board orders against Steinberg with respect to production of documents and witnesses. That evidence, it was asserted, would otherwise not have been available to those parties except through their own witnesses and, hence, without the freedom to cross-examine Steinberg's witnesses. The Board does not regard that argument as compelling. The Board certainly has the discretion whether to grant leave to a party seeking to withdraw all or part of a complaint or application. The Board has only in the rarest of instances refused such leave. Moreover, there is nothing to suggest the allegations against Steinberg were frivolous or were initiated in order to obtain a tactical advantage in the complaints against A&P. Given the Board's various conclusions regarding the reach of the stay order and the manner in which the case has proceeded to date, the individual complainants and the Teamsters are now faced with a strategic decision. Should both seek leave to withdraw the section 91 allegations against Steinberg and confirm that no relief against Steinberg is sought in the section 64 application, the Board would not refuse such leave.

19. To summarize, for the reasons given, the Board finds that the court order issued pursuant to the C.C.A.A. does stay the instant proceedings against Steinberg. Further, again for the reasons given, the individual complainants and the Teamsters have the following options:

- (a) to await the expiration of the stay order; or
- (b) to obtain a modification of the stay order to permit these proceedings to continue as presently constituted; or
- (c) to withdraw the complaints pursuant to section 91 of the *Labour Relations Act* against the respondent Steinberg and confirm that, in the section 64 application, there is no relief sought against the respondent Steinberg.

Unless a variation in the stay order of the court is granted, as noted, or unless *both* the individual complainants and the Teamsters elect option (c) (in which case the Board proceedings will continue against the respondent A&P), the Board shall adjourn the instant case until the expiration of the court order. A number of dates have been set for continuation of this matter. Whether the hearing will reconvene on some or all of the dates set will depend upon the decision of the individual complainants and the Teamsters and, if sought, whether a variation in the court order stay is granted. Counsel for the Teamsters and for the individual complainants are directed to inform the Board in writing as soon as possible with respect to whether some or all of the dates set should be cancelled and/or whether new continuation dates are needed.

20. This matter is referred to the Registrar in accordance with the foregoing.
-

1971-91-R The Canadian Textile and Chemical Union, Applicant v. **Union Felt Products (Ontario) Ltd.**, Almac Products Inc., and Almac Industries Inc., Respondents v. United Steelworkers of America, Upholstering & Allied Industries Division (U.D.), Intervener

Sale of a Business - "UF" purchasing "A" and subsequently transferring certain machinery, production and employees from UF's location to A's location - Employees of UF and A represented by different unions - UF planning total integration of two companies at location of A, but plans put on hold - Board finding intermingling and ordering representation vote to determine which of two trade unions should continue to hold bargaining rights

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *N. Roland*, *L. Ritchie*, *L. Sutherland* and *A. Feijo* for the applicant; *R. A. Werry* and *S. Caplan* for the respondents; *P. Turtle* and *J. O'Connor* for the intervener.

DECISION OF THE BOARD; July 15, 1992

1. This is an application under sections 1(4) and 64 of the *Labour Relations Act* (the "Act"). After hearing the evidence of the parties, by decision dated June 2, 1992 we directed the filing of written submissions. We have received submissions from the applicant and intervener. We have received no submissions from the respondents pursuant to that decision. The applicant seeks a declaration that there has been a sale of a business and intermingling of employees and *inter alia* requests that one bargaining unit be described and a representation vote be held in order to determine which of two unions represent the employees in question. The intervener asserts that no sale of a business has occurred but that should the Board conclude otherwise, the Board should exercise its discretion not to order a vote among the employees, or alternatively put certain limits on any voting constituency should a vote be ordered. In that the parties have set out their submissions in writing we do not intend to review them in detail. We note that in his opening comments to the panel counsel for the respondents indicated that the respondents' position was that there had been a sale of a business.

2. The background to this application is substantially not in dispute and can be outlined as follows. In late 1988 and early 1989, Union Felt Products (Ontario) Ltd. ("Union Felt") entered into negotiations with the owners of Almac Industries Inc., an unrelated and competitor company, both operating in the textile industry. On October 11, 1989 a deal was closed wherein the business of Almac Industries Inc. was sold to Almac Products Inc. Almac Products Inc. ("Almac") was incorporated specifically for the purpose of making the purchase from Almac Industries Inc. Almac is owned by Union Felt and its officers and directors are Messrs. Irving and Melvin Himel. These individuals are also the owners and directors of Union Felt. All of the business of Almac Industries Inc. transferred, including but not limited to, all machinery, inventories, leasehold improvements, goodwill, and rights and title to patents and brand names.

3. The employees of Almac Industries Inc. continued to be employed. That plant is situate

on Weston Road in the Municipality of Metropolitan Toronto. The intervener holds bargaining rights for a bargaining unit of employees described as all employees of Almac Industries Inc. in the Municipality of Metropolitan Toronto, save and except certain exclusions (the "Weston" employees). The applicant holds bargaining rights for a bargaining unit described as all employees of Union Felt Products (Ontario) Ltd. in the Municipality of Metropolitan Toronto, save and except certain exclusions. Union Felt operates a plant on Wiltshire Boulevard in the Municipality of Metropolitan Toronto (the "Wiltshire" employees).

4. On December 31, 1989 a second transaction took place. Almac transferred what it had purchased from Almac Industries Inc. to Union Felt. Following the sale from Almac to Union Felt on December 31, 1989 the Weston employees continued to be paid by Almac. Mr. S. Caplan, the Vice-President and Corporate Counsel for Union Felt, described Almac as existing at that point as a "payroll company". The two plants continued to operate with separate plant managers. Subsequently, Almac was registered as a business name of Union Felt and since January 1992 all products and invoicing are solely in the Union Felt name.

5. Beginning in January 1990 there was discussion of the consolidation of the two operations. They duplicated a number of processes and/or products. In 1990 felt production at Wiltshire was stopped and orders were met with felt supplied by production at the Weston plant. At that time, and although different options were discussed, a decision was made to close the Wiltshire location, to dispose of that property, and move all operations to Weston Road. In the result, in the fall and winter of 1991 the synthetic department was transferred from Wiltshire to Weston. This included both machinery and employees. Employees from Wiltshire were utilized in the transfer to set up the machines and employees were transferred to then run the equipment.

6. The overall move was planned to occur over approximately a two year period. In August 1991 Wiltshire employees were called to a meeting by the Himels and the planned integration of the two operations at the Weston location was outlined to them. Representatives of both trade unions were present. Prior to that, the representative of the applicant asked for and received a tour of the Weston plant. At the meeting Mr. M. Himel made clear an intention to integrate the Wiltshire and Weston operations. The intervener's representative was of the view that this was however conditional, and that he understood that even if the integration occurred, two separate bargaining units operating under two separate collective agreements would continue even at one plant. However we are satisfied from a review of the evidence that at that meeting a clear intention to integrate the operations at the Weston Road location was disclosed and further, that the Himels' indicated that they would continue to apply both existing collective agreements until such time as the two unions or the Labour Board had determined any issue of representation. The representatives of the respondents have, throughout these proceedings, attempted to avoid becoming caught in what they see as an issue for the employees and the two unions involved. The representatives of both unions identified potential labour relations difficulties with regard to issues of lay-off, bumping, posting rights, and seniority rights and expressed their concerns at that meeting. Following the August meeting the union representatives had brief discussions but were unable to come to any resolution.

7. In the result, employees, for example from the synthetic department, that transferred to Weston continued to be treated as members of the "Wiltshire" bargaining unit and were paid and dealt with according to the applicant's collective agreement. Employees from Weston continued to be dealt with according to the intervener's collective agreement.

8. At the time of this hearing it was apparent that the two-year time frame for total integration of the operations was no longer viable. Union Felt had been unable to find a buyer for the

Wiltshire property. No specific plans existed for the movement of the balance of equipment and there is no longer an established intention to move everything to Weston Road. In the present economic circumstances the cost of moving from Wiltshire is prohibitive. The remaining identifiable intention is to close the Wiltshire plant at some point and to somehow integrate the operations.

9. It is the intervener's contention that employees at Weston Road are employed by Almac and that no sale of a business to Union Felt has occurred. While the facts are perhaps somewhat unusual we do not accept that submission. It is clear that Almac was created for the sole purpose of facilitating the sale of Almac Industries Inc. to Union Felt. Union Felt now owns and controls all of the business of its previous competitor Almac Industries Inc. That is the operative transaction in these particular circumstances. The separation of the payroll function performed by Almac is consistent with the Himels' intention to treat the entities separately in that they bear different legal responsibilities to each of two separate bargaining units and bargaining agents. That is the only function performed by Almac and Almac itself is now a registered business name of Union Felt. There is no basis to accord Almac a separate employer identity in these circumstances. There is no doubt that there is only one employer. While the employees at Weston may identify themselves as "Almac" employees (not surprising perhaps, having been employed by Almac Industries Inc.) we are satisfied that that *business* has been purchased by Union Felt Products (Ontario) Ltd. Contrary to the intervener's submission, this finding is entirely consistent with the purpose of section 64, to preserve bargaining rights when the legal identity of the employer has changed. The difficulty in this case arises because two trade unions hold bargaining rights for similarly described employees within the same geographic area now employed by the same employer. Simply put, the bargaining rights held by the applicant and intervener described in their respective recognition clauses now overlap. This raises the issue of whether there has been an intermingling within the meaning of section 64(6) of the Act and if so what consequences flow. Should the bargaining units now be described more specifically such that the applicant's bargaining rights be referable to the Wiltshire location and the intervener's bargaining rights be referable to the Weston location or is it more appropriate that one bargaining unit be described?

10. In addition to the facts already outlined, the degree of integration of the two operations can be summarized as follows. While the two physical operations have not been integrated according to the original plan, there has been movement of work between the plants. All felt production at Wiltshire has stopped and any and all felt production is being performed at Weston. As a result of this reduction of work at Wiltshire at least one employee transferred to another area in the Wiltshire plant. The synthetic line has moved from Wiltshire to Weston. Employees from Wiltshire were used to move and to set up the machinery at Weston, and operators from Wiltshire were then transferred to Weston. For a four to five week period during the transition, the machines were operated on a night shift and the employees were supervised by the Weston night crew supervisor. There has been a reduction in picker room work at Wiltshire and Mr. Marshall, the plant manager at Wiltshire, confirmed that at least some of this work has transferred to Weston. Shoddy production is being performed at Weston. No new raw material is being ordered for shoddy production at Wiltshire and this work will (if it has not already) cease at Wiltshire. It is Mr. Marshall's belief that while there has been a reduction in sales, a lay-off at Wiltshire was at least in part a result of shoddy production being performed at Weston and then purchased by Wiltshire. Material handlers at Weston are dealing with raw material and inventory for all production at Weston including the synthetic line and the attendant warehousing has shifted from Wiltshire to Weston. Similarly, truck drivers are dealing with product from both locations. Both existing collective agreements cover both material handlers and truck drivers. There has been one complaint as between Weston and Wiltshire drivers as to who was entitled to certain preferred loads, a matter based at least in part on seniority. The order desk at Wiltshire has been closed and an employee at Weston operates an order desk and schedules the machines for both locations. The representative of the Wiltshire

health and safety committee has been asked to inspect the Weston premises. In that there are no physical barriers between the transferred Wiltshire employees and the employees at Weston, health and safety problems in the Weston plant potentially affect both groups of employees equally. The employer has attempted to maintain separate lines of supervision between employees from Wiltshire and employees from Weston.

11. Both trade union representatives identified a number of potential difficulties arising from the integration of the operations and attempting to maintain and administer two separate collective agreements. They are not difficult to anticipate and include primarily the difficulty of allocating scarce or preferable work as between employees whenever seniority is a factor. There is the difficulty for each bargaining agent in determining the precise ongoing nature of the constituency that it represents for purposes of bargaining and then asserting those rights on employees' behalf, for example, where work is shifted, where employees are being recalled, or to take an existing example, where work is being performed without regard to its origin, as with the material handlers and truck drivers. The only unusual feature in this case is that the original plan for complete integration, while not changed, has been put on hold due to other economic variables.

12. Whether intermingling is described as "of the employees" or "of the business" we are satisfied on the facts outlined that intermingling has occurred. What then, from a labour relations point of view? The fact that there has not been a complete integration of the two operations is not determinative of any result. The question is whether the labour relations difficulties that are contemplated by section 64(6) have, or are likely to, arise, and if so, how best to resolve the bargaining unit configuration and any resulting issue of representation. This is not a case where employees from a non-union environment are intermingled with employees of a unionized environment. In that case, the same conflicts may not arise as clearly do arise in circumstances where the employer is confronted with applying two sets of rules arising from separate collective agreements to a group of employees.

13. We agree with the intervener that existing bargaining rights ought not to be lightly interfered with. The difficulty in this case however, as the applicant points out, is that the existing bargaining rights of both the applicant and intervener have been affected by the business decision of the employer. While we also agree that a finding of intermingling may not preclude the maintenance of two separate bargaining units, we are not persuaded that that is an appropriate result in the circumstances of this case. Having determined that a sale has occurred both trade unions have equal claim to the work being performed in accordance with the recognition clauses in their respective collective agreements. The underlying problem in this case is that they also each have equal claim to bargaining rights for all employees including those historically represented by the other trade union. This is clearly a representation issue.

14. To the extent that the intervener seeks to rely on the *City of Peterborough* [1984] OLRB Rep. Dec. 1752, we prefer and adopt the reasoning in the *Municipality of Metropolitan Toronto*, [1992] OLRB Rep. March 315 (see particularly paragraphs 56-69 of that decision).

15. In the result we conclude pursuant to section 64(6) of the Act that one bargaining unit be described to include all employees represented by the applicant (the "Wiltshire employees") as well as all those employees represented by the intervener (the "Weston employees"). In the circumstances it is appropriate to order a representation vote to determine which of the two trade unions should continue to hold bargaining rights for the one bargaining unit.

16. The applicant would have the Board order the vote as of the date of the effective announcement to the employees of the integration, that is August 28, 1991. The applicant argues that all employees including those on lay-off be entitled to vote. It is the intervener's position that

should a vote be ordered, only those employees who are actually physically present at the Weston location be allowed to vote. The panel's goal is to structure the vote so that it will reflect the wishes of the employees who have a real and continuing interest in the outcome of that vote. In the circumstances we direct that the voting constituency be comprised of all employees of Union Felt Products (Ontario) Ltd. that fall within the existing bargaining units represented by the applicant and intervener at either location who were employed on September 12, 1991, or who have become employed since that date, and who continue to be employed on the date the vote is taken.

17. We have not specifically described one combined unit at this time as we note that certain specific exclusions to the otherwise "all employee" descriptions are described differently as between the two existing recognition clauses. We intend that the voting constituency include the Wiltshire and Weston employees over whom the applicant or intervener currently claim bargaining rights. This includes any employee currently on lay-off who continues to enjoy a right of recall as of the date of the vote under the collective agreement currently applying to that employee. If there is any dispute concerning the voters' list that matter may be dealt with by the panel. The parties can agree to allow an individual to vote and segregate that ballot pending the resolution of any dispute regarding their eligibility to vote should that become necessary.

18. This matter is referred to the Manager of Field Services for the purpose of having the parties meet with a Labour Relations Officer to describe the voting constituency set out, to prepare a voters' list and to forthwith conduct the representation vote ordered.

3248-90-OH Wade Dennis Proctor, Complainant v. Whitler Industries Limited, Respondent

Damages - Discharge - Health and Safety - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and R. R. Montague.

APPEARANCES: Linda Vannucci-Santini and Wade Dennis Procter for the complainant; R. H. Parker for the respondent.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER R. R. MONTAGUE: July 16, 1992

1. This is the continuation of a complaint under the *Occupational Health and Safety Act*. By decision dated May 3, 1991, reported at [1991] OLRB Rep. May 718 the complaint was allowed and Mr. Procter was ordered to be reinstated and compensated for his losses due to the unlawful layoff. The Board remained seized in case the parties were unable to agree on the quantum of compensation owing. Since they were not able to agree, the matter was rescheduled to deal with the complainant's claim for vacation pay, damages for mental distress and for the loss of coverage of a dental plan.

ADJOURNMENT REQUEST

2. The matter of compensation was originally scheduled to be heard on December 9, 1991. On November 20, 1991, counsel for the complainant asked the Board to adjourn that date because the complainant was undergoing surgery which required a six-week recovery period. On November 21, 1991 the Board received a letter from the employer, Mr. Parker, asking that there be no hearing on December 9, 1991, because he did not feel that a hearing was necessary on the issue of damages at all. On November 27, 1991, having been approached for consent to the requested adjournment by complainant's counsel, Mr. Parker wrote to the Board, saying that he did not agree to an adjournment because he could not agree on any necessity for delay and did not agree that Mr. Procter's surgery necessitated the recovery period stated by his doctor. Mr. Parker's earlier request to cancel the hearing on December 9 and have no hearing was then renewed in his letter to the Board dated the next day, November 28, 1991.

3. Mr. Parker wrote on December 3, 1991 asking for the reasons for the decision to grant the adjournment, which we now provide. Given that the complainant's request for an adjournment was based on medical grounds, supported by medical documentation, in sufficient time to reschedule the matter within a reasonable period of time, i.e. January 16, 1992, the Board granted the adjournment. There was no prejudice cited by Mr. Parker in his letter communicating his opposition to the delay, and in any event, the following day repeated his desire to have no hearing at all.

The Damages Issue

4. The facts leading to the Board's decision to allow the complaint are more fully set out in its earlier decision, but may be briefly summarized here. The complainant lost the top of his finger while cleaning a dust collector at work in January, 1991. He was off work on compensation for a month. When he returned to work, he found the dust collector in the same state as when he had injured his finger, and the workplace in a state that he found unsafe. His immediate complaints to his foreman were followed by his termination later the same day.

5. The complainant testified that since the time of the loss of part of his finger at work in January 1991, he has suffered nightmares, frequent headaches, and stress and that his layoff a month later made it worse. He has also had feelings of fear and finds that any contact with Whitler Industries or Mr. Parker causes him great stress. Relating to the period of time around the discharge he specifically mentioned being disturbed by his treatment when trying to get his separation papers. Mr. Procter testified that Mr. Parker had him return twice before filling out a separation slip and made remarks such as, "I want to fire you, but I can't get away with it, so I am laying you off." Mr. Parker did not deny making such remarks. Mr. Procter has had a number of other stressful contacts with Mr. Parker since his discharge, concerning his reinstatement as well as other matters.

6. Mr. Procter was offered reinstatement on May 23, 1991, by Whitler Industries, further to the Board's May 3, 1991 decision. However, due to Mr. Procter's continuing difficulties with his finger and carpal tunnel syndrome (a wrist condition, often affecting finger mobility), he had been continuously unable to return to work up to the time of the hearing on the damages issue. For periods up until November, 1991, Mr. Procter was in receipt of Workers' Compensation Benefits. However, in August, 1991, Whitler Industries wrote the Worker's Compensation Board (WCB), questioning the relatedness of the carpal tunnel syndrome to the workplace injury. Sometime prior to the cessation of benefits in November, the WCB decided that the carpal tunnel condition was not related to the compensable injury and terminated benefits, a decision which was under appeal by Mr. Procter at the time of the hearing on the damages issue.

7. The Board admitted, over the objection of the employer, medical reports concerning the complainant's claim that the discharge caused him mental distress. The April 24, 1991 opinion of the complainant's psychiatrist describes a mild post-traumatic stress disorder arising from the workplace injury which he finds unsurprising given the horrific nature of the injury. Further, he says the disorder "seems to be perpetuated by the unresolved work situation and the rage he feels." Further, it states that "the symptoms seem to be intensified by the unresolved health issues...." and recommends postponement of therapy until after the next series of meetings in Toronto (possibly referring to the Board's hearing on the merits.) In his June 11, 1991 report, Mr. Procter's family doctor, whom he has seen approximately weekly since the time of the injury speaks of psychological strain resulting from the injury. He says as well:

...Contributing to his ongoing struggle was the termination of his job this winter. For a three week interval immediately following this event, he felt quite depressed. He expresses to me the anger, humiliation and frustration over the inconsistent and contradictory dealings he had with his employer.

Mr. Procter has suffered a stress reaction that resulted in nightmares, loss of self-esteem and a phobia towards his former work site. This stems from his injury and has been reinforced by his job termination.

He later saw the psychiatrist again in August and December 1991.

8. Mr. Procter expressed concern about what use would be made of the medical reports, of which Mr. Parker was given copies. During the hearing, the Board made it clear that the medical information put into evidence in this hearing was only to be used for the purposes of the litigation in front of the Board.

9. As to the claim for dental benefits, Mr. Procter testified that he had an abscessed tooth which required extraction in July, 1991, which cost three hundred dollars. He was then informed that he needed root canal work which would cost seven hundred dollars and seven fillings at one hundred dollars each. He has not been able to afford the root canal work or the fillings and has thus not had that work done. Evidence indicated that this dental work is covered by the dental plan in place at Whitler Industries. Mr. Parker testified that benefits are discontinued on termination of employment, and that was why the plan did not cover Mr. Procter's dental needs. He said that if Mr. Procter had returned to work in May 1991, after the Board's order, he would have been covered. Mr. Parker has not previously dealt with the question of benefits while on sick leave, but he testified that whether or not the insurance company pays depends on what he tells them as to the employee's status.

The Parties' Submissions

10. Complainant's counsel argued that the Board's jurisdiction to award mental distress damages was established in *Jacmorr Manufacturing Limited*, [1987] OLRB Rep. Aug. 1086, and that this is a proper case in which to award them. The broad remedial discretion of the Board was also relied on to support this claim. Counsel also made reference to *Vorvis v. ICBC*, (1989) 25 C.C.E.L. (S.C.C.), to demonstrate the availability of such damages at common law in cases of wrongful dismissal. As to the amount of damages for mental distress, counsel said that the courts have ordered damages from \$500 to \$25,000 on this head of damages, and left the matter in the Board's hands. On the subject of the dental benefits, counsel argued that had the complainant not been unlawfully dismissed, he would have been covered for the dental work, and thus should be awarded the full cost of the necessary work.

11. Mr. Parker, the employer, takes the position that if damages for mental distress were to

be awarded in this case, they would be warranted every time an employee did not like his or her employer. Additionally, he argues that based on the *Jacmorr* decision, *supra*, this is not a proper case for mental distress damages because there was no mention made of the damages in the initial hearing on the merits of the complaint. Mr. Parker also questioned the validity of the family doctor's opinion on stress. He suggests that not only should no damages be awarded, but that Mr. Procter was better off on WCB benefits than he would have been working for Whitler Industries, due to the differential tax treatment of WCB benefits. He urges the Board to take that into account as well.

12. Mr. Parker's position on the dental benefits is that if Mr. Procter was subject to reinstatement during the period in which the dental work was needed he would be entitled to the benefits but since he did not return to work, for reasons beyond the control of Whitler Industries, he should not be entitled to the benefits.

Decision

13. The complainant claims damages for mental distress due to the unlawful discharge up to May 7, 1991, shortly after the release of the Board's decision allowing the complaint. The period of time claimed does not include the periods of difficulty getting a phone in June, because of the employer's advice to the phone company that the complainant no longer worked there, or in dealing with the potential of modified work with the WCB in the fall and winter of 1991, which Mr. Procter alluded to in his testimony as also stressful.

14. The Board's jurisprudence on the subject of damages for mental distress is limited. The matter was considered most recently in the *Jacmorr* decision, *supra*. In the circumstances of that case the Board declined to award them, because the claim had not been raised in a timely manner. Nonetheless, the Board clearly found that its broad remedial jurisdiction included the possibility of such damages and saw no reason why the Board should be less sensitive than the courts or other tribunals to the possibility that illegal conduct might give rise to this form of general damages.

15. A somewhat related discussion appeared in the earlier Board decision in *Newport Sportswear Limited*, [1981], OLRB Rep. July 905, at paragraphs 47 to 51. In that case, the Board declined to award damages for assault on the complainant's dignity, finding that the evidence did not warrant them. In doing so it referred to *K-Mart*, [1981] OLRB Rep. Jan. 60 and [1981] OLRB Rep. Feb. 185 where the Board had originally ordered damages for assault on dignity but had then withdrawn the order. This was because the union had consented to an order of the Divisional Court staying the payment of compensation pending judicial review, which removed the immediate remedial impact of the order, as well as the fact that the issue had not been fully argued. While counselling caution in exercising its discretion to award non-pecuniary damages, the original award was made in light of the Board's conclusion that the other available remedies would be ineffective to remedy the situation where a calculated offence to the dignity of an individual was the very means by which an unfair labour practice had been achieved.

16. Thus, the Board to date has not awarded damages specifically for mental distress, not because it lacks jurisdiction to do so, but because cases where they have been claimed to date have not involved circumstances in which the Board found it appropriate to do so. In *K-Mart*, it had awarded damages for assault on the complainant's dignity, a closely related concept, but the order was later withdrawn. In each case, the object is to return the complainant as nearly as possible to the situation he or she would have been in if the statute had not been breached, insofar as that is possible, either by way of monetary redress or other remedies. The goal is to make the complainant whole, avoiding under or over-compensation. Although the conduct of the respondent is relevant in assessing the probable impact on the complainant, and therefore the likelihood of loss, the

Board's remedial power is only compensatory. It is not punishment for the respondent's behaviour. The focus must be on what loss the complainant suffered and how it may be remedied.

17. The respondent asserts that this case is analogous to *Jacmorr* in that the claim for damages was raised too late. Although there was no evidence related to this issue at the original hearing on the merits, the matter had been raised in the amended complaint, well before the first hearing. The Board made it clear at one point in the hearing that it would likely remain seized on the question of damages, to which neither party objected. Thus, the claim was raised in a timely manner and is properly entertained by the Board. Mr. Parker also argued that because the complainant was better off financially on Workers' Compensation benefits than he would have been working at Whitler Industries, the Board should award no damages for mental distress. If there had been a wage loss claim, this is a matter which we might well have taken into account in calculating damages. We are not of the view that it is a pertinent consideration in determining an issue of non-pecuniary damages such as those claimed for mental distress.

18. At common law, damages for mental distress are available in actions for wrongful dismissal, under certain limited circumstances, as set out most recently by the Supreme Court of Canada in *Vorvis v. ICBC*, *supra*. That case made clear that damages in successful actions for wrongful dismissal are to be determined on the basis of what was in the reasonable contemplation of the parties to the contract. Since dismissal with notice is in the presumed contemplation of employers and employees in a non-organized situation, the damages flow from the lack of notice, and not from the dismissal. In that situation, damages for mental distress have to be shown to be caused, not by the dismissal itself, but by some other aspect of the facts. The majority and minority opinions in the Supreme Court of Canada differed over the articulation of the test itself, and the extent to which the source of the mental distress need be "independently actionable" or not, but it is clear from both sets of judgements, and the jurisprudence that preceded it, that the courts did not see damages for mental distress in wrongful dismissal actions being routinely available, even granted the point that dismissal is normally stressful. (See, for example, *Brown v. Waterloo Regional Board of Commissioners of Police*, (1983), 150 D.L.R. (3d) 729, among others.)

19. Although much of the discussion in *Vorvis* is pertinent to the considerations before us as to how to place Mr. Procter in the position he would have been had the respondent not breached the OHSA, there is an important difference in the legal context in which the issue arises. This is not an action for breach of contract, as is an action for wrongful dismissal. Nor is it an action in tort for intentional infliction of mental suffering, or any other tort. Nor is it a claim for compensation for a breach of a collective agreement, as in *Re Ontario Hydro and C.U.P.E.*, 16 L.A.C. (4th) 264, where Arbitrator Kates applied the *Vorvis* case to require a breach of the collective agreement other than the discharge itself to be necessary to found a claim for damages for mental distress in that context. It is a claim for compensation for breach of a statute, which certainly should not be held to be in the reasonable contemplation of parties to an employment contract. See in general on the subject of damages in cases of statutory remedies *A-G of Canada v. Morgan*, 85 D.L.R. (4th) 473 (Fed. C.A.). See also *Piazza v. Airport Taxicab (Malton) Assn.*, (1989) 69 O.R.(2d) 282 (C.A.), which approved of a decision of a Board of Inquiry under the Ontario Human Rights Code concerning a discharge found to be unlawful under that statute, which did not consider itself limited to the measure of damages appropriate in an action for unjust dismissal. The Court of Appeal expressly approved *Whitehead v. Servodyne Canada Ltd.* (1987), 8 C.H.R.R. D/3874, which had held that the usual measure of economic loss in contract law for wrongful dismissal was not the correct measure of damages to compensate an aggrieved complainant under the Human Rights Code, since it would often be inadequate to compensate the complainant and also to carry out the purposes of the Code.

20. We accept, as a general theoretical matter, that the measure of damages in contract cases will not necessarily be appropriate in remedying breaches of the OHSA. Breaching a statute is a matter of public law, not the private law written by the parties to a contract. One is not constrained here by the terms, express or implied, of the parties' contract, although they will often be relevant in assessing loss, e.g. wage loss. The Board is free to tailor the remedy to the actual damaging effects, given the fact that the Legislature left the Board to use its broad discretion as to remedy as set out in the Labour Relations Act. At times, this may mean a more extensive remedy than in contract; at other times, it could be less.

21. In considering the issue of damages for mental distress, the questions to be answered by the Board are not essentially different than in any other area of damages: Was there a loss due to mental distress caused by the breach of the statute? This will involve deciding whether the evidence supports a finding that the impact on the individual is identifiable mental distress, i.e. negative stress going significantly beyond the normal stress of life and work with its inevitable frustrations, personality conflicts and difficulties of all sorts. If there is a mental distress loss, what remedy can best put the complainant in the position he or she would have been if the statute had not been breached? What complicates the issue of damages for mental distress is that the loss, and by resulting necessity the effect of the remedy, are intangible, and less readily determinable, both in terms of fact finding, and in terms of choosing what remedial direction is necessary to, as far as possible, undo the damage done to the complainant. The question of how extensive the mental distress is can appropriately be dealt with at the stage of choosing what remedy, including what quantum, if any, of damages should be awarded. The Board must also consider whether the damages claimed are too remote in the chain of causation to be recognized.

22. The courts have made clear in general that the onus is on the complainant to prove claimed damages when disputed, and that awards of damages without evidence and the chance for the party opposite to challenge mitigation may be suspect. See, for example, *Red Deer College v. Michaels et al.* 57 D.L.R. (3d) 386 and *The Queen in Right of Ontario v. OPSEU*, April 26, 1990 (Div. Ct.) (the Cahoon case). Accordingly, when claiming damages for mental distress, a complainant may well make relevant much of his or her personal and mental health history which would otherwise be irrelevant to the hearing of a complaint such as this (and reluctance to make public such material, or be cross-examined on it, may well be a sufficient reason for a complainant to decide not to pursue such damages).

23. Has the complainant shown he suffered a mental distress loss caused by the unlawful discharge? There is uncontradicted medical evidence that he suffered mental stress as a result of the termination, and that it aggravated the level of stress he was experiencing after his serious occupational injury. Although Mr. Parker questioned the validity of the family doctor's opinion in a psychiatric matter, the family doctor's opinion is consistent with the psychiatrist's. It remains uncontradicted, and not inherently lacking in credibility. Therefore, we have no legal basis to ignore it. The evidence does not establish any reason to conclude that the additional stress outlined in the medical reports probably resulted from something other than the unlawful discharge.

24. It is reasonable to conclude from Mr. Procter's testimony and all the circumstances of the case that a successful return to work after the loss of part of his finger might have alleviated some of the stress he was experiencing at that point. Instead, his abrupt termination within hours of his return to work, for complaining about safety conditions related to his injury, had an exacerbating effect on his symptoms of stress. His family doctor mentions a period of three weeks of depression. In April, three months after the discharge, the psychiatrist found both the unresolved employment situation and the unresolved health issues to be perpetuating factors in the mild post-traumatic stress disorder he diagnosed. Thus, the unlawful discharge caused increased symptoms of

stress and a loss of peace of mind in the form of depression and perpetuation of a stress disorder. We are satisfied that these facts fall within the category of mental distress, rather than more common forms of stress and aggravation. Although the evidence did not establish that the effect on Mr. Procter's mental state was part of Mr. Parker's considerations when he fired him, it was foreseeable that an abrupt, unlawful discharge, related as it was to a safety concern that had earlier resulted in the loss of part of Mr. Procter's finger, would cause mental distress to Mr. Procter. Thus the damages are not too remote in the chain of causation to be recognized.

25. What is the appropriate award in this case to compensate Mr. Procter? Have his losses already been remedied by the Board's earlier finding of breach of the OHSA and order of reinstatement? Given that the Board's goal is to neither under, nor over-compensate, it would not be appropriate to award damages for mental distress when other remedial orders of the Board had, as far as possible, put Mr. Procter back in the position he would have been had the breach of the Act not occurred. In this case, it cannot be said that the mental distress loss has been remedied, even if the complainant had been reinstated (which he had not been as of the time of the hearing on damages, through no one's fault). The evidence indicates that the increase in mental distress caused by the unlawful discharge was real and serious, related as it was to a safety concern about the very problem which had taken part of the complainant's finger a month earlier. The part of the earlier award which allowed for the possibility of damages for mental distress was the portion which awarded damages for any losses due to the layoff, but left it to the parties to work out quantum, which they were unable to do. The evidence before us is persuasive that there was a mental distress loss due to the layoff.

26. We are of the view that an award of damages in the amount of \$500 is the appropriate award for mental distress in this case. The damages are set at this level because of the fact that the evidence indicates that the stress which followed his injury and the unresolved health issues were the major components of the complainant's mental distress, while the discharge was an exacerbating factor.

27. The main reason, other than the evidentiary and procedural matters dealt with above, put forward by the respondent for not awarding damages for mental distress is the assertion that this would lead to an award for mental distress damages whenever an employee did not like his employer. This is not a likely outcome of an award for mental distress on the evidence in this case, nor a tenable basis for their award. The basis for their award is the evidence of their causation by the illegal discharge, rather than any personal antipathy to Mr. Parker, and the lack of an effective alternative remedy in the circumstances of this case.

28. As to the claim for the dental work, the evidence indicates that the plan in place at Whitler Industries covered the type of work that the complainant needed. Given that the only specific evidence of a disentitling event was the unlawful discharge itself, and that there is no evidence before us that sick leave or absence on workers' compensation would have disentitled Mr. Procter from the receipt of dental benefits, we declare that Mr. Procter was entitled to their receipt. The respondent may either arrange for the carrier to cover the work, or pay to Mr. Procter the amount of \$1,700.

29. As to vacation pay, Mr. Parker agreed that he owes 4 percent of whatever Mr. Procter earned between September 1990 and February 16, 1991. The Board so declares and will remain seized if there is any difficulty calculating that amount.

30. In summary, then, the respondent is ordered to pay to the complainant the following:

- (a) \$500 as damages for mental distress, with interest thereon from February 17, 1991,
- (b) \$1,700 (or arrangement for coverage by the carrier) for dental work, with interest thereon on the portions Procter paid himself from the dates he paid them, and,
- (c) Vacation pay to be calculated on the basis of 4 percent of the complainant's earnings between September 1990 and February 16, 1991, with interest thereon from the last date for which he was paid.

The interest rate will be as in Practice Note 13, i.e. the prime rate as determined and published by the Bank of Canada in the Bank of Canada Review for the month of February, 1991, the month the complaint was filed with the Board.

31. The Board will remain seized to deal with any difficulty in implementing this decision.

DECISION OF BOARD MEMBER R. W. PIRRIE; July 16, 1992

1. I dissent from that portion of this majority decision which awards damages for mental distress to Mr. Procter.

2. I agree with the majority of the panel that the Board has the jurisdiction to award damages for mental distress. However, I disagree that this case involves circumstances which warrant such an award, and therefore such a significant departure in Board policy.

3. In the *Newport* and *K-Mart* cases cited in the majority award, the Board was dealing with unfair labour practices. The line of reasoning evolved in those cases for not awarding or awarding mental distress damages is, in my opinion, equally applicable to wrongful discharge cases under the *Occupational Health and Safety Act*. In *Newport* the employee most active in organizing the union was fired after having been threatened and vilified by the owner of the company. The union sought reinstatement for the employee which was awarded, as well as a specific monetary award for humiliation and loss of dignity which was not awarded. In that case the Board commented that "where the Board concludes that it is the discharge itself that constitutes the unfair labour practice and not the means by which it was carried out, reinstatement with full compensation will normally remedy the violation." In the instant case Mr. Procter was treated no more harshly than the employee in *Newport*.

4. In *K-Mart* an award was initially ordered for the assault on the dignity of two employees. In that case the employees were not terminated, but rather subjected to, "a ruthless campaign of surveillance that endured for some three weeks." In the absence of the reinstatement remedy the Board awarded damages to the two employees for the assault on their dignity. In my opinion that award was an appropriate remedy in the circumstances of that case.

5. The courts, and indeed society have long recognized that every termination, whether lawful or unlawful, puts the person terminated under a degree of mental stress. Witness the elaborate counselling processes that have evolved in recent years to assist employees to cope with the fact of termination. A significant factor in generating stress in the termination situation, and more particularly in unlawful situations, is the loss of income. In the instance case Mr. Procter suffered no loss of income. As noted in paragraph 6 above Mr. Procter was in receipt of Workmen's Compensation benefits throughout the period.

6. In arriving at the decision to make a monetary award of \$500.00 to Mr. Procter, the majority decision places great significance on the two medical reports which the complainant put into evidence. This medical evidence was largely uncontradicted by the respondent. One of the reports is a letter dated April 24, 1991 from a Dr. N. Oliver, M.D., associated with the Community Mental Health Clinic in Kingston, Ontario to Mr. Procter's doctor, a Dr. A. Silverberg in Peterborough, Ontario, which is quoted in part at paragraph 7, page 3 of the majority decision. I find it instructive to consider the entire context of that letter;

"Dear Dr. Silverberg:

Re: Wade Procter

We have seen the above-named as requested on April 18, 1991 in consultation and the story is, as you are aware, that he lost the end of his fingers (**Mr. Procter in fact lost the tip of the small finger on his right hand**) in an industrial accident for which he has been on Workman's Compensation since January 11, 1991. Since that time, and with one revision of the stump, he complains of headaches up to five times a day, anger, nightmares about the incident, and repeated memories, with emotional content, of the incident. He feels frustrated and angry, he says, that he can not get back to work and is working this through the Health and Safety Board.

(Paragraphs 2 and 3 containing personal family background have been omitted).

Although Mr. Procter has had a long term of excessive drinking he denies blackouts except for the last two years of alcoholism and has never experience psychosis, shakes, or DT's. He used soft street drugs in conjunction with the alcohol and this may have intensified some symptomatology. Mr. Procter claims to have been sober now for five months and with only four episodes of being drunk since 1989.

On examination he presents as a reasonably groomed gentleman who appears his stated age of 32 years. Affect is unremarkable. There were no ticks on his mannerisms, disorders of speech or articulation. Our conversation was occupied with the accident and his rage towards the employer and the business for the poor treatment of him. He denies illusions, hallucinations or delusions and demonstrates none. He was oriented in three spheres. Memory appears intact.

In summary we have a 32 year old male who presents with emotional liability, headaches, nightmares of the incident, emotional preoccupation with the incident, and consistent anger towards the employer. He denies symptoms of any major disorder and shows none.

Given the somewhat horrific nature of the circumstances surrounding the injury it is not surprising that he had developed a mild post-traumatic stress disorder which seems to be perpetuated by the unresolved work situation and the rage he feels. Mr. Procter was ambivalent about entering into therapy for this and as the symptoms seem to be intensified by the unresolved health issues we have suggested that he is more than welcome to return here however it would make sense to delay this until after the next series of meetings in Toronto.

Given the addictive personality I could not recommend any medications to deal with the anxiety symptoms to which he would not likely become habituated. Should Mr. Procter wish more ongoing therapy he will contact your office, or contact us and present for regular appointments until a more convenient Peterborough psychiatrist can be found.

Thank you for your referral.

Yours sincerely"

7. The picture I perceive is a recovered alcoholic claiming to have been sobered since November 1990 - some two months after his employment by Whitler Industries in September 1990. No doubt a stressful situation for Mr. Procter.

8. In January 1991 Mr. Procter lost the end of the small finger on his right hand while cleaning an exhaust system at work. No doubt a stressful situation for Mr. Procter.

9. On his return to work in February 1991 he found the situation described in paragraph 4 of the majority award, i.e. "the dust collector in the same state as when he had injured his finger, and the workplace in a state he found unsafe." No doubt a stressful situation for Mr. Procter. However, instead of refusing to work and lodging a complaint under the Occupational Health and Safety Act, Mr. Procter's reaction, in his words, was to lose his temper and start hollering and screaming. I would suggest Mr. Procter was already in a highly stressed state of mind before he was terminated.

10. In my opinion, taken in its entirety, Dr. Oliver's report does not support Mr. Procter's claim of mental distress stemming from his termination. What I find relevant in Dr. Oliver's letter is:

- in the first paragraph quoted Mr. Procter's symptoms of "... headaches up to five times a day, anger, nightmares... repeated memories, with emotional content..." are tied directly to the loss of the tip of the finger in the industrial accident.

- in the fourth paragraph quoted the doctor again relates Mr. Procter's symptoms of "headaches", "nightmares" and "emotional preoccupation" to the industrial accident. Mr. Procter himself denies symptoms of any major disorder, and Dr. Oliver indicates that he shows none.

- what is reflected in paragraphs one and four is frustration and anger that he cannot get back to work and consistent anger toward the employer.

- in the fifth paragraph quoted Dr. Oliver observes that it is not surprising that Mr. Procter developed a *mild* post traumatic stress disorder vis-a-vis the injury which seems to be perpetuated by the unresolved work situation. No suggestion the mild stress disorder was caused by the termination.

- going on in the fifth paragraph Dr. Oliver observes that Mr. Procter was ambivalent about undertaking therapy for his stress disorder, nor does the doctor promote such treatment.

- lastly in the fifth paragraph the reference to "unresolved health issues" is I suggest a reference to Mr. Procter's having undergone a revision to the stump of the finger amputated on March 27 some two weeks before the meeting with Dr. Oliver.

- in the sixth paragraph the question of ongoing therapy is treated in a very casual way "should Mr. Procter wish more ongoing therapy he will contact your ("Dr. Silverberg's) office". Not exactly the stuff of a great mental distress disorder in my opinion.

11. I turn now to Dr. Silverberg's letter of June 11, 1991 addressed to the Toronto Worker's Health and Safety Legal Clinic in Toronto and more precisely Miss Vannucci-Santini who acted as counsel for Mr. Procter. This letter is also quoted in part at paragraph 7 of the majority award. Again I find it instructive to quote the first two sentences of the letter which were omitted:

"I have known Wade Procter since January 1991 and have followed him closely since then. We have focused on his psychological strains resulting from the recent injury sustained at work."

The letter then goes on as quoted at paragraph 7 at page 3.

12. In general I put this letter in the category of self serving evidence. That said, Dr. Silverberg's association with Mr. Procter appears to be coincident with his finger injury. In addition the letter refers to the psychological strains stemming from the work injury, and cites the termination of his job as a contributing factor.

13. A portion of the evidence which I cannot ignore however is that Mr. Procter made a claim to the Workmen's Compensation Board for mental stress compensation. The claim was rejected by the Board and Mr. Procter has appealed that rejection, as he is appealing the rejection of his claim re carpal tunnel syndrome. Even allowing that WCB might have its own criteria for mental stress cases, I find the claim rejection to be not without significance.

14. I agree with the majority of the panel that Mr. Procter suffered, and likely still suffers from mental distress. With respect I disagree that the evidence before us is persuasive that there was significant mental distress due to the termination which justifies an award beyond reinstatement.

15. Consistent with our earlier order to reinstate Mr. Procter I would concur in that portion of the award concerning dental work and vacation pay.

2526-89-G (Court File No. 210/92) Ellis-Don Limited, Applicant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

Board decision reported at [1992] OLRB Rep. Feb. 147.

Ontario Court of Justice, Divisional Court, Steele J., July 17, 1992.

STEELE J.: The applicant, Ellis-Don Limited ("Ellis-Don"), has applied for judicial review of the final decision of the Ontario Labour Relations Board ("OLRB") dated February 28, 1992, finding

that Ellis-Don was bound to the terms of a provincial agreement. The present motion is to compel the attendance of the chair, vice-chair, and registrar of the OLRB before an official examiner to obtain information with respect to the procedures implemented by the OLRB in arriving at its final decisions, and specifically with respect to its decision in this matter, dated February 28, 1992. It is also for the production of reports and other documents with respect to its general procedures for the making and review of decisions, and its general procedures with respect to full board hearings, and in particular with respect to the February 28, 1992, decision, and the full board meeting considering the draft decision of the OLRB, dated December 1991. The motion does not seek any substantive information, but only procedural information.

An application for judicial review is a civil proceeding, and therefore the Rules of Civil Procedure apply. (See *Canadian Workers Union v. Frankel Structural Steel Limited et al.* (1976), 12 O.R. (2d) 560.) However, those rules must be interpreted in the context of the application and in the context of s. 111 of the *Labour Relations Act*, R.S.O. 1990, c. L.2 (the Act) which refers to “civil suit.”

Judicial review is commenced by an application. It is not an action. Under rule 39.03 (1), a person may be examined as a witness before the hearing of an application. Rule 34.01 (d) makes rule 34.10 (2) (b) applicable. Therefore, the person to be examined must bring to the examination and produce for inspection all non-privileged documents that the notice of examination sets out. There is no independent right of production on judicial review. Rules 31.03 (1) and 30.02 (1) have no application because they refer only to “actions.” Therefore, the independent relief claimed in paras. 2 and 3 of the motion relating to production is dismissed.

The remaining issue is whether or not the named officers of the OLRB are compellable persons to be examined and, if they are, should they be ordered to attend for such purpose.

The background of this motion is that Ellis-Don is a large general contractor in the construction industry. The International Brotherhood of Electrical Workers, Local 894 (Local 894), filed a grievance with the OLRB alleging that Ellis-Don had violated a provincial agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors’ Association of Ontario and the International Brotherhood of Electrical Workers of the I.B.E.W. Construction Council of Canada (the Provincial Agreement). Ellis-Don denied the grievance on the basis that it was not bound by the Provincial Agreement. A panel of the OLRB heard the grievance and, by its final decision, of February 28, 1992, found that Ellis-Don was bound by the terms of the Provincial Agreement and upheld the grievance.

Representatives of Ellis-Don received a copy of an earlier draft decision of the panel, dated December 1991 (the draft decision), which found that Ellis-Don was not bound by the Provincial Agreement and dismissed the grievance. Between the date of the draft decision and the final decision, a full meeting of the OLRB was called to review the draft decision. In both the draft decision and the final decision, the OLRB described the key issue of “abandonment” to be a matter of fact. Whether it is a fact or a conclusion of policy is a matter for the court hearing the application because it raises an arguable issue. There is no dispute as to what the evidence was. Ellis-Don wants to examine the named board officers to determine the procedures followed in order to see if they unduly influenced the members of the panel to change their minds in the final decision. In effect, it seeks information to determine whether or not it has been denied fundamental justice.

The principle of the OLRB holding full board meetings to review draft decisions of its panels relating to policy matters (as opposed to factual matters) has been approved by the Supreme Court of Canada in *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282. In that case, however, it was the procedure only that was approved because the court had no knowledge of the

effect of the review, and the issue of compellability of witnesses was not before the court. In addition, the OLRB made full disclosure of its 1983 procedures.

In the present case, there is *prima facie* evidence of the effect of the review. Counsel for Ellis-Don submits that facts as opposed to policy, in the decision, were changed as a result of the full board review, and that he needs to know if the present procedures are the same as they were in 1983 and whether the chairman or the panel asked for the review to see if there is a factual basis for the judicial review application. As stated in *Commission des Affaires Sociales v. Tremblay* (Supreme Court of Canada, unreported, April 16, 1992) at p.20:

...what is crucial is to determine the *actual situation* prevailing in the body in question.

Because of the OLRB having referred to "abandonment" as a matter of fact in its decision, but its counsel arguing that it is a policy matter, the OLRB's general procedures may define what is policy and what is fact. Counsel for Ellis-Don concedes that the actual situation may prove to be to his client's detriment, but that he is entitled to know the procedure followed. The position of the OLRB is that its practice is the same as that followed in *Consolidated Bathurst*. It has given not further information.

In *Tremblay* the issue was a point of law which was decided favourably to the respondent. After the full board hearing, one of the hearing panel changed her mind and the hearing panel was divided. As a result of the Commission's stated procedures, the president of the Commission gave the deciding decision, which was unfavourable to the respondents. The formal process of the Commission in *Tremblay* was set out by statute and regulations and was well known. Notwithstanding this, the court held that all procedures must be in keeping with natural justice. It acknowledged that secrecy was the rule, but that it may be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. The concern was with the institutional setting in which the decision was made and how it functioned, and second, with its actual or apparent influence on the intellectual freedom of the decision makers.

Counsel for Ellis-Don also relied on *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289, in support of his position. I do not believe that that decision of the Supreme Court of Canada is of any particular significance to the present case other than that its comments with respect to bias can properly be considered as part of natural justice.

In my opinion, Ellis-Don has shown a change in what the OLRB itself has said is a factual matter and therefore that its request is not merely a fishing expedition. There is an issue of natural justice and Ellis-Don should be able to present full information to the court at the hearing of the judicial review.

There remains the issue of whether s. 111 of the Act precludes the officers of the board being called to give evidence. Section 111 provides as follows:

Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

Judicial review is a civil suit (see *Canadian Workers Union, Supra*). However, s. 111 cannot be used to deny a procedural investigation regarding natural justice. In *Singh v. Minister of Employment and Immigration*. [1985] 1 S.C.R. 177 at 219, Wilson J., in reference to an argument relating to administrative procedures and sections 1 and 7 of the *Charter*, stated as follows:

...The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles...

In my opinion, that statement can be applied to natural justice apart from any reference to the *Charter*. It refers to administrative procedures and not to an act of the Legislature such as s. 111. However, I cannot accept that the Legislature intended s. 111 to interfere with natural justice. As stated in *Newfoundland Telephone*, p.299, administrative boards that are adjudicative in nature will be expected to comply with the standard applicable to courts.

This motion must be dealt with on the ground of natural justice because the applicant, being a corporation, cannot rely on s.7 of the *Charter*. (See *Irwin Toy Ltd. v. Quebec (Attorney General)*, 58 D.L.R. (4th) 577.) The principle of reading down legislation applies to constitutional cases and perhaps *Charter* cases. Section 111 protects the officers of the OLRB from being required to give testimony in a civil suit. Testimony is defined in Jowitt's Dictionary of English Law as being "the evidence of a witness given *viva voce* in a court of justice or other tribunal." The motion before me is not to require the officer to give testimony at a trial or hearing, but to require them to be discovered regarding procedural matters going to the issue of natural justice. If they cannot be discovered, then the information may never become available. I cannot believe that s. 111 was meant to deny information going to the issue of natural justice. Where the denial of natural justice is alleged, the purported violator cannot hide behind procedural legislation to deny the claimant the right to investigate whether or not he has been wronged.

I therefore conclude that s. 111 does not preclude the granting of an order to achieve the ends of natural justice.

Orders directing members of the OLRB to submit to examination should be granted sparingly. The should be granted only where there is an obvious appearance that natural justice may not have occurred. This is a lesser test than the strong *prima facie* case test required on stay applications.

In the present case, there is only the statement by counsel for the OLRB that its procedures in 1992 were the same as those considered in *Consolidated Bathurst*. There is no evidence as to who instigated the full board review. There is a *prima facie* case that the final decision was changed on what is perhaps a question of fact. I believe that Ellis-Don has shown valid reason to believe that the procedures followed denied it natural justice, and that it is entitled to enquire as to the procedures followed. For these reasons an order will issue for the relief asked in para. 1 of the motion.

Costs are to the applicant payable by Local 894 in an amount to be fixed. Written submissions may be made on or before August 12, 1992. Not costs to the OLRB or the Attorney General.

2367-87-R (Court File No. M6147) International Brotherhood of Electrical Workers, Locals 594, Patrick Wyse and Maurice Walsh, Applicants v. **International Brotherhood of Electrical Workers, Local 586** and The Ontario Labour Relations Board, Respondents

Constitutional Law - Construction Industry - Charter of Rights - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal

Board decision reported at [1988] OLRB Rep. May 491 as *J.S.H. Mueller Ltd.*; Divisional Court decision reported at [1990] OLRB Rep. Dec. 1365.

Court of Appeal for Ontario, Carthy, Arbour and Abella JJ. A., July 20, 1992.

Carthy J.A. (Endorsement): Motion for leave to appeal from order of Divisional Court is dismissed with costs of respondent union payable by applicant union.

CASE LISTINGS JUNE 1992

PAGE

1.	Applications for Certification	149
2.	Applications for First Contract Arbitration	155
3.	Applications for Declaration of Related Employer.....	156
4.	Sale of a Business	157
5.	Applications for Declaration Terminating Bargaining Rights.....	158
6.	Applications for Declaration of Unlawful Strike	161
7.	Applications for Declaration of Unlawful Strike (Construction Industry)	162
8.	Applications for Declaration of Unlawful Lockout (Construction Industry)	162
9.	Applications for Declaration of Unlawful Lockout	162
10.	Complaints of Unfair Labour Practice	162
11.	Applications for Consent to Prosecute.....	166
12.	Jurisdictional Disputes.....	166
13.	Applications for Determination of Employee Status.....	167
14.	Complaints under the Occupational Health and Safety Act	168
15.	Construction Industry Grievances	168
16.	Applications for Reconsideration of Board's Decision	172

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3103-90-R: Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) v. United Steelworkers of America (Intervener)

Unit: "all employees of Mississauga Hospital in Mississauga employed as registered or graduate nursing assistants, save and except assistant unit administrators, and persons above the rank of assistant unit administrator" (160 employees in unit)

1739-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Gordon Barr Limited (Respondent)

Unit: "all construction labourers in the employ of Gordon Barr Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Gordon Barr Limited in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, and the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3191-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Protein Foods Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Protein Foods Group Inc. in its Protein Foods Canada Division in the Town of Paris, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (112 employees in unit) (*Having regard to the agreement of the parties*)

3209-91-R: United Steelworkers of America (Applicant) v. Brampton Foundries Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Brampton Foundries Limited in the City of Brampton, save and except forepersons, persons above the rank of foreperson, office, clerical and technical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (77 employees in unit)

3468-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Capital Supermarkets (1988) Limited c.o.b. as LOEB I.G.A. Convent Glen (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Capital Supermarkets (1988) Limited c.o.b. as LOEB I.G.A. Convent Glen at 6509 Jeanne D'Arc Boulevard, Gloucester (Orleans), save and except General Manager (Grocery), Head Service Manager, Produce Manager, Meat Manager, Director of Fresh Foods, Scratch Bakery Manager, Bakery Service Manager, Maintenance Manager, Deli Manager, Service Supervisors (which shall not exceed 4 persons), Dairy/Frozen Food Manager, Night Crew Manager, Grocery Buying Manager, Evening Grocery Manager,

cleaning and maintenance employees, security guards, office and clerical staff and persons above the rank of manager” (213 employees in unit) (*Having regard to the agreement of the parties*)

4155-91-R: Bricklayers Masons Tile & Terrazzo Workers Local No. 7 (Applicant) v. Le Jean Blue Inc. (Respondent) v. Labourers’ International Union of North America, Local 527 (Intervener)

Unit: “all bricklayers, marble masons, tilayers and terrazzo workers and their apprentices in the employ of Le Jean Blue Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, marble masons, tilayers and terrazzo workers and their apprentices in the employ of Le Jean Blue Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0007-92-R: United Brotherhood of Carpenters and Joiners of America Drywall, Acoustics Lathing and Insulation, Local 675 (Applicant) v. Precise Drywall Insulation (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Precise Drywall Insulation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Precise Drywall Insulation in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

0009-92-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Precise Drywall Insulation (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Precise Drywall Insulation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Precise Drywall Insulation in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0133-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. 917921 Ontario Inc. c.o.b. as Loeb Baywood (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 917921 Ontario Inc. at 105 Bayly Street West, in the Town of Ajax, save and except Store Manager, LOEB Fresh; Store Manager, LOEB Ready; Store Manager, Grocery; Store Manager, Service; Manager, Grocery; and persons above the rank of Store Manager, LOEB Fresh, Store Manager, LOEB Ready; Store Manager, Grocery; office and clerical staff” (185 employees in unit)

0458-92-R: FWTAO Support Staff Association (Applicant) v. Federation of Women Teachers’ Associations of Ontario (Respondent)

Unit: “all office and clerical employees of the Federation of Women Teachers’ Associations of Ontario, in the Municipality of Metropolitan Toronto, save and except the Assistant Office Manager & Accounting Supervisor and persons above the rank of Assistant Office Manager & Accounting Supervisor and the Confidential Secretary” (69 employees in unit) (*Having regard to the agreement of the parties*)

0469-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mardave Construction (1990) Limited (Respondent)

Unit: “all employees of Mardave Construction (1990) Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0515-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. J. G. Stewart Construction Ltd. (Respondent)

Unit: “all employees of J. G. Stewart Construction Ltd. in the Township of North Dumfries, save and except Supervisors and persons above the rank of Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

0516-92-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. McEndon Ltd. (Respondent)

Unit: “all construction labourers and persons engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of McEndon Ltd. in the District of Manitoulin (except that portion of the District of Manitoulin which comes within Board Area #17), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (1 employees in unit)

0521-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dualux Enterprises Inc. (Respondent)

Unit: “all employees of Dualux Enterprises Inc. at 117 Vulcan Street in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff” (41 employees in unit) (*Having regard to the agreement of the parties*)

0538-92-R: Public Service Alliance of Canada (Applicant) v. James Bay General Hospital (Respondent)

Unit: “all paramedical employees of the James Bay General Hospital in Moosonee, Fort Albany, Attawapiskat and Kashechewan, save and except Directors, persons above the rank of Director, professional medical staff, Payroll/Personnel Officer, Administrative Secretary and persons for whom any trade union held bargaining rights as of May 14, 1992” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

0577-92-R: Service Employees Union, Local 210 (Applicant) v. The Corporation of the Ursuline Religious of the Diocese of London c.o.b. as Glengarda Child & Family Services (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the Corporation of the Ursuline Religious of the Diocese of London c.o.b. as Glengarda Child & Family Services in the City of Windsor, save and except Supervisor, persons above the rank of Supervisor, office and clerical employees, maintenance employees, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of May 19, 1992” (14 employees in unit) (*Having regard to the agreement of the parties*)

0669-92-R: International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario (Applicant) v. Wayne Penner Masonry Limited (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Wayne Penner Masonry Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Wayne Penner Masonry Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institu-

tional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit)

0694-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Catalytic Maintenance Inc. (Respondent)

Unit: “all journeymen and apprentice insulators and asbestos workers in the employ of Catalytic Maintenance Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice insulators and asbestos workers in the employ of Catalytic Maintenance Inc. in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0699-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Foster Wheeler Limited (Respondent)

Unit: “all journeymen and apprentice insulators and asbestos workers in the employ of Foster Wheeler Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice insulators and asbestos workers in the employ of Foster Wheeler Limited in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0725-92-R: International Ladies’ Garment Workers’ Union (Applicant) v. Simmons Canada Inc. (Respondent)

Unit: “all employees of Simmons Canada Inc. in the City of Cornwall, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff, Quality Assurance Co-ordinator and persons for whom any trade union held bargaining rights as of June 5, 1992” (15 employees in unit) (*Having regard to the agreement of the parties*)

0751-92-R: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Flint Industrial Contractors Inc. (Respondent)

Unit: “all iron workers and iron workers’ apprentices, save and except rodmen, in the employ of Flint Industrial Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all iron workers and iron workers’ apprentices, save and except rodmen, in the employ of Flint Industrial Contractors Inc. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0808-92-R: Ontario Public Service Employees Union (Applicant) v. The Children’s Aid Society of the Districts of Sudbury and Manitoulin (Respondent)

Unit: “all employees of the Children’s Aid Society of the Districts of Sudbury and Manitoulin in the City of Sudbury, Town of Little Current, Township of Chapleau, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff” (6 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3925-91-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Saf-T-Green Incorporated (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada and its Local 172, Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervenors)

Unit: “all employees of the Saf-T-Green Canada Incorporated, save and except non-working foremen, those above the rank of foreman, sales and engineering staff, office staff and all carpenters and carpenters’ apprentices employed in all sectors of the construction industry in the Province of Ontario” (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	18
Number of segregated ballots cast by persons whose names appear on voter’s list	1

0383-92-R: Christian Labour Association of Canada (Applicant) v. W & W Electric Inc., c.o.b. as Alberni Electric (Respondent) v. The International Brotherhood of Electrical Workers Local 303 (Intervener)

Unit: “all electricians and electrician apprentices, linemen and lineman apprentices in all sectors of the construction industry of the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand excluding industrial, commercial, institutional (ICI) sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

4064-91-R: Teamsters Local Union 938 (Applicant) v. Chicago Rawhide Products Canada Ltd. (Respondent)

Unit: “all employees of Chicago Rawhide Products Canada Ltd. in the Municipality of Oakville, save and except Supervisors, persons above the rank of Supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	10
Number of persons who cast ballots	10
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

2656-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Admiral Drywall Ltd. (Respondent) (6 employees in unit)

4156-91-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Le Jean Blue Inc. (Respondent) v. Bricklayers Masons Tile & Terrazzo Workers Local No. 7 (Intervener) (2 employees in unit)

0061-92-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Hamilton Forming Limited (Respondent) (2 employees in unit)

0062-92-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Hamilton Forming Limited (Respondent) (6 employees in unit)

0435-92-R: International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. Sam Masonry (Respondent) (5 employees in unit)

0475-92-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Kraken Electric Ltd. (Respondent) (3 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3174-90-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Stephens and Rankin Inc. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit #1: “all employees employed by the employer in the Province of Ontario as carpenters, carpenters’ apprentices, truck drivers and construction labourers and in any classification set out in schedule “A” hereto, save and except non-working foremen and persons above the rank of non-working foreman” (20 employees in unit) (*Clarity Note*)

Number of persons listed as eligible	100
Number of persons who cast ballots	90
Number of segregated ballots cast by persons whose names appear on voter’s list	89
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	30
Number of ballots segregated and not counted	90

3933-91-R: Christian Labour Association of Canada (Applicant) v. Trillium Villa Nursing Home (Respondent) v. London and District Service Workers’ Union, Local 220 (Intervener)

Unit #1: “All employees of Trillium Villa Nursing Home in the City of Sarnia, save and except supervisors, persons above the rank of supervisor, registered nurses” (115 employees in unit)

Number of persons listed as eligible	115
Number of persons who cast ballots	103
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	82

0046-92-R: Labourers International Union of North America, Local 506 (Applicant) v. Ellis Don Limited (Respondent) v. Operative Plasterers’ and Cement Masons International Association of the United States and Canada, Local 598 (Intervener)

Unit #1: “all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario” (6 employees in unit)

Number of persons listed as eligible	6
Number of persons who cast ballots	6
Number of segregated ballots cast by persons whose names appear on voter’s list	6
Number of ballots segregated and not counted	6

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0401-91-R: IWA - Canada (Applicant) v. Loger Toys Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Loger Toys Limited in Brantford, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, and persons regularly employed for not more than 24 hours per week” (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	28
--------------------------------------	----

Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	20

0256-92-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Dinnerex Inc. c.o.b. as Swiss Chalet Restaurant (Respondent) v. Group of Employees (Objectors)

Unit: "all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and Assistant Dining Room Manager Trainees employed by Dinnerex Inc. at its Swiss Chalet Restaurant at 642 Dixon Road in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	48
Number of persons listed as in dispute	48
Number of persons who cast ballots	37
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	25

Applications for Certification Withdrawn

3823-91-R: Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. T.G. Bright and Co. Limited (Respondent)

0106-92-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Fashion Interiors Ltd. (Respondent) v. International Brotherhood of Painters and Allied Trades, Local 205 (Intervener)

0184-92-R: The International Association of Bridge, Structural and Ornamental Ironworkers Local 721 (Applicant) v. Canadian BBR (1980) Inc. (Respondent) v. Labourers' International Union of North America, Local 183; Labourers' International Union of North America, Local 506 (Intervenors)

0369-92-R: Construction Workers Local 53, CLAC (Applicant) v. The Parent Co. Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 235 and Ontario Sheet Metal Workers' & Roofers' Conference (Intervener)

0543-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Bellwoods Centres for Community Living Inc. (Respondent)

0551-92-R: Canadian Union of Public Employees (Applicant) v. Ridley Terrace Non Profit Homes Inc. (Respondent)

0704-92-R: Canadian Union of Public Employees (Applicant) v. Sunny Face Day Care Centre Inc. (Respondent)

0722-92-R: Local 47, Sheet Metal Workers' International Association (Applicant) v. Novytech Contracting Inc. (Respondent)

APPLICATION FOR FIRST CONTRACT ARBITRATION

3289-91-FC: United Steelworkers of America (Applicant) v. Mannesmann Demag Ltd. (Respondent) (*Withdrawn*)

3934-91-FC: United Food and Commercial Workers' International Union, Local 1000A (Applicant) v. Bavar-

ian Meat Products Ltd. and 965349 Ontario Limited c.o.b. Bavarian Meats (Retail) (Respondents) (*Withdrawn*)

0756-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Vila Verde Masonry (Respondent) (*Granted*)

0757-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Oeste Bricklayers Ltd. (Respondent) (*Granted*)

0758-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Good Knight Masonry Ltd. (Respondent) (*Granted*)

0759-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Stroke Masonry Ltd. (Respondent) (*Granted*)

0760-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Lourimar Masonry Ltd. (Respondent) (*Granted*)

0761-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. F.S.R. Construction Ltd. (Respondent) (*Granted*)

0762-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Lunardon Construction Masonry Ltd. (Respondent) (*Granted*)

0763-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Frank's Masonry Ltd. (Respondent) (*Granted*)

0764-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Pinheiro Masonry (Respondent) (*Granted*)

0765-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. O.J. Masonry Ltd. (Respondent) (*Granted*)

0766-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Sequest Construction Ltd. (Respondent) (*Granted*)

0885-92-FC: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Ridge Land-fill Corporation (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0597-91-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating, 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems (Respondents) (*Granted*)

0621-91-R: Ontario Nurses' Association (Applicant) v. Carecor Health Services Inc., Baycrest Hospital, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Hillcrest Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, (Respondents) (*Withdrawn*)

1089-91-R: Toronto Typographical Union (Applicant) v. Southam Inc., Southam Business Communications Inc., Southam Graphics Group and Nographics (Canada) Limited (Respondents) (*Withdrawn*)

2373-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. R.R. Projects Inc., Golden Arms Flooring Inc., (Respondents) (*Granted*)

2782-91-R: Teamsters Local Union 938 (Applicant) v. Clarke Railfast a Division of Clarke Transport Inc. (former Clarke Transport Canada Inc.) (Respondent) (*Withdrawn*)

3752-91-R: United Food and Commercial Workers' International Union, Local 1000A (Applicant) v. Bavarian Meat Products Ltd. and 965349 Ontario Limited c.o.b. Bavarian Meats (Retail) (Respondents) (*Granted*)

4035-91-R: International Brotherhood of Painters and Allied Trades Local 205 (Applicant) v. Westdale Painting & Decorating Limited and Fashion Interiors Ltd. (Respondents) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

0290-92-R: Teamsters Local Union No. 230, Ready Mix, Building Supplies, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Costa Earthmoving Inc. and Costa Trucking & Contracting Ltd. (Respondents) (*Withdrawn*)

0319-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 981884 Ontario Limited, (Respondents) (*Granted*)

0422-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Canada Blue Tanning Company Limited and 681639 Ontario Limited (Respondents) (*Withdrawn*)

0528-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Feer Insulation Ltd. and/or Tri-Star Insulation Limited and/or Dannis Contracting Ltd. (Respondents) (*Granted*)

0529-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Feer Insulation Ltd. and/or Felix Lopes Sheet Metal Ltd. (Respondents) (*Withdrawn*)

0621-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Valley Interiors Limited and Jumecon Construction (Respondents) (*Withdrawn*)

0625-92-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Financial Times Corporation Limited, The Globe and Mail, Thomson Newspapers Company Limited (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0597-91-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating, 883553 Ontario Inc., c.o.b. as Acme Bivalent Systems (Respondents) (*Granted*)

1089-91-R: Toronto Typographical Union (Applicant) v. Southam Inc., Southam Business Communications Inc., Southam Graphics Group and Norgraphics (Canada) Limited (Respondents) (*withdrawn*)

2374-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. R.R. Projects Inc., Golden Arms Flooring Inc., (Respondents) (*Dismissed*)

2782-91-R: Teamsters Local Union 938 (Applicant) v. Clarke Railfast a Division of Clarke Transport Inc. (former Clarke Transport Canada Inc.), (Respondent) (*Withdrawn*)

3709-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tamblyn-Pritchard-Johnston Construction Limited, Tamblyn-Pritchard Construction Inc.,

Pritchard Consulting Services Incorporated and Tamblyn-Pritchard Management Inc. (Respondents) (*Withdrawn*)

3753-91-R: United Food and Commercial Workers' International Union, Local 1000A (Applicant) v. Bavarian Meat Products Ltd. and 965349 Ontario Limited c.o.b. Bavarian Meats (Retail) (Respondents) (*Dismissed*)

3850-91-R: 965349 Ontario Limited c.o.b. Bavarian Meats Retail (Applicant) v. United Food and Commercial Workers International Union, Local 1000A (Respondent) (*Dismissed*)

4035-91-R: International Brotherhood of Painters and Allied Trades Local 205 (Applicant) v. Westdale Painting & Decorating Limited and Fashion Interiors Ltd. (Respondents) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

0289-92-R: Teamsters Local Union No. 230, Ready Mix, Building Supplies, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Costa Earthmoving Inc. and Costa Trucking & Contracting Ltd. (Respondents) (*Withdrawn*)

0319-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 981884 Ontario Limited, (Respondents) (*Granted*)

0423-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 681639 Ontario Limited Canada and/or Blue Tanning Company Limited (Respondents) (*Withdrawn*)

0528-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Feer Insulation Ltd. and/or Tri-Star Insulation Limited and/or Dannis Contracting Ltd. (Respondents) (*Granted*)

0529-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Feer Insulation Ltd. and/or Felix Lopes Sheet Metal Ltd. (Respondents) (*Withdrawn*)

0621-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Valley Interiors Limited and Jumecon Construction (Respondents) (*Withdrawn*)

0662-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palisade Homes Limited and/or Redmark Homes (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2386-90-R: Ann Gratton (Applicant) v. Ontario Nurses' Association (Respondent) v. Sidbrook Private Hospital (Intervener)

Unit: "all registered and graduate nurses employed in a nursing capacity by Sidbrook Private Hospital in Cobourg, save and except the Director of Nursing, and those above the rank of Director of Nursing" (10 employees in unit) (*Granted*)

Number of persons listed as eligible	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	4

Number of ballots segregated and not counted 2

2110-91-R: Elizabeth Gierasimczuk (Applicant) v. United Food and Commercial Workers' International Union - Local 175 (Respondent) v. Royce Dupont Poultry Packers (Intervener) (*Dismissed*)

3645-91-R: Joe Colavecchia (Applicant) v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada ("CAW - TCA") and its Local 252, (Respondent) v. Willow Manufacturing Co. Ltd. (Intervener)

Unit: "all employees of Willow Manufacturing Co. Ltd. working in its plant in the Municipality of Metropolitan Toronto, save and except Foremen, persons above the rank of Foreman, office and sales staff" (13 employees in unit) (*Granted*)

Number of persons listed as eligible	16
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	11

3927-91-R: Greg Ferguson (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union Number 172 (Respondent) v. Polymeric Engineering Limited (Intervener)

Unit: "all employees of Polymeric Engineering Limited, save and except those above the rank of working foreman" (6 employees in unit) (*Granted*)

Number of persons listed as eligible	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	4

4033-91-R: Michael Porter (Applicant) v. The International Brotherhood of Electrical Workers, The IBEW Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 804 (Respondents) v. Fluker Electrical Mechanical Contractors, Division of H. Fluker Consultants Inc. (Intervener)

Unit: "all electricians and electricians' apprentices employed by the intervener in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (1 employees in unit) (*Granted*)

Number of persons listed as eligible	1
Number of persons who cast ballots	1
Number of segregated ballots cast by persons whose names appear on voter's list	1

4164-91-R: Bill Brockman (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Respondent) v. Rison Construction and Engineering Limited (Intervener)

Unit: "all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (3 employees in unit) (*Granted*)

Number of persons listed as eligible	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

0066-92-R: Barry Griffith et al, (Applicants) v. Labourers' International Union of North America, Ontario Provincial District Council, and its affiliated Local Unions, Labourers' International Union of North America, Local 183, 597, 1059 and 1081 (Respondents) v. Arnott Construction Ltd. (Intervener) (*Withdrawn*)

0098-92-R: Padjen Bozidar (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada and/or Local 252 (CAW) (Respondent) v. Anchor Lamina Inc. (Intervener)

Unit: "all employees of Anchor Lamina Inc. in the City of Mississauga, save and except Foremen, persons above the rank of Foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Granted*)

Number of persons listed as eligible	33
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	22

0193-92-R: Robert Arpan (Applicant) v. Teamsters, Chauffeurs, Warehousemen, Helpers Local 880 (Respondent) v. Retco Industries Ltd. (Intervener)

Unit: "all employees of Retco Industries Ltd. in the City of Windsor, save and except Supervisors, persons above the rank of Supervisor, office and sales staff" (20 employees in unit) (*Granted*)

Number of persons listed as eligible	20
Number of persons who cast ballots	20
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	16

0194-92-R: Phillip Clayton (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Novocol Pharmaceutical of Canada Inc. (Intervener)

Unit: "all employees of Novocol Pharmaceutical of Canada Inc. in the City of Cambridge, save and except Supervisors, persons above the rank of Supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (37 employees in unit) (*Granted*)

Number of persons listed as eligible	40
Number of persons who cast ballots	37
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	26

0199-92-R: Wendy M. Sanché, Carol Bouvier, Nancy Josefowich, Edith Nachtigal, Penni Carbonneau, Randy Peterman - Bavarian Meats Retail Staff, (Applicants) v. United Food and Commercial Workers' International Union, Local 1000A (Respondent) v. Bavarian Meats - Retail 965349 Ontario Ltd. (Intervener) (*Dismissed*)

0207-92-R: Robert Harry Macklin (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Respondent) v. Bill Bailey of Belleville Limited (Intervener)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Bill Bailey of Belleville Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working Foremen and persons above the rank of non-working Foreman" (1 employee in unit) (*Dismissed*)

0212-92-R: Michael Porter (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) v. H. Fluker Consultants Inc. c.o.b. Fluker Electrical-Mechanical Contractors (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of H. Fluker Consultants Inc. c.o.b. as Fluker Electrical-Mechanical Contractors, in all sectors of the construction industry in the County of Grey,

excluding the industrial, commercial and institutional sector, save and except non-working Foremen and persons above the rank of non-working Foreman” (1 employee in unit) (*Granted*)

0355-92-R: Arlene Cadieux (Applicant) v. Patricia Morrison, Representative, Eastern Canada Council OPEIU (Respondent) v. Maison Baldwin House (Intervener) (*Withdrawn*)

0386-92-R: Fernando Medeiros (Applicant) v. Labourers’ International Union of North America Local 1059 (Respondent) v. Ekum-Sekum Incorporated carrying on business as Brantco Construction (Intervener) (*Withdrawn*)

0395-92-R: Paul McConachie (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Respondent) v. Ken Acton Plumbing and Heating Inc. (Intervener)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Ken Acton Plumbing and Heating Inc. in the County of Grey and the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working Foremen and persons above the rank of non-working Foreman” (10 employees in unit) (*Granted*)

Number of persons listed as eligible	10
Number of persons who cast ballots	8
Number of ballots marked against respondent	8

0436-92-R: William Mader (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers - Local 95 (Respondent) v. Martin and Alexis Vander Velden, operating as M-X Insulation (Intervener) (*Withdrawn*)

0439-92-R: Martine Caza, Anna Commisso, Barb Lang, Lori DuBois, Maryann Boban, Patti Reeves, Laureen Sinclair (Applicants) v. Hospitality, Commercial and Service Employees Union, Local 73 (Respondent) v. Magicuts (Intervener) (employees in unit) (*Granted*)

0505-92-R: Mario Maola (Applicant) v. Labourers’ International Union of North America, Ontario Provincial District Council and its affiliated Local Unions (Respondent) (*Withdrawn*)

0633-92-R: Suzette Woodcock (Applicant) v. Service Employees Union, Local 183 (Respondent)

Unit: “all lay employees of the Sisters of St. Joseph of the Diocese of Peterborough [hereinafter referred to as the “employer”] at 1545 Monaghan Road, Peterborough, save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (19 employees in unit) (*Dismissed*)

0660-92-R: Sterling Fuels Division of Ultramar Canada Inc. (Applicant) v. The International Union of Operating Engineers Local 793 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0835-92-U: Canada Building Materials Company (A Division of St. Mary’s Cement Corporation) (Applicant) v. Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters and Chauffeurs, Warehousemen of America, Joe McLean, George (Gerrard) Kunz, David Smith, Claude Page, Tim Stanley, Dan Weese and Ken Wuensch (Respondents) (*Granted*)

0869-92-U: Canada Building Materials Company (A division of St. Mary’s Cement Corporation) (Applicant) v. Teamsters Local Union 230, Ready Mix, Building Supply Hydro and Construction Drivers, Warehousemen and Helpers, affiliated with the International Brotherhood of Teamsters and Chauffeurs, Warehousemen of America, and John Burt, Hugh MacKinnon, Lionel Fort and Wayne Gifford (Respondents) (*Granted*)

0882-92-U: Dufferin Concrete Products - Hamilton (A Division of St. Lawrence Cement Company) (Applicant) v. Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters and Chauffeurs, Warehousemen of America, Joe McLean; Doug Monas, Joe Cameron (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0755-92-U: Matthews Contracting Inc. (Applicant) v. Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen & Helpers affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen, & Helpers of America, ("Local 230") and John Burt (Respondents) (*Withdrawn*)

0836-92-U: Torino Drywall Services, Marel Contractors Ltd. and Canrose Drywall Co. Ltd. (Applicants) v. Rejean Pelchat, G. Boudreau, E. Manseau, Mac Dubois, Edwin Alvarez, Jose Alvarez, Alan Goulet, Joel Lefort (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT (CONSTRUCTION INDUSTRY)

3042-90-U: International Brotherhood of Electrical Workers, Local 353, James McGuire, Bob Lappin And Bob Gilbert (Applicants) v. International Brotherhood of Electrical Workers, IBEW Construction Council of Ontario, Guild Electric Limited, Ainsworth Electric Ltd., Plan Electric Limited (Respondents) (*Dismissed*)

0796-92-U: The Amalgamated Transit Union Local 1633 (Applicant) v. The Corporation of the City of Wexford (Respondent) (*Withdrawn*)

DIRECTION RESPECTING UNLAWFUL LOCKOUT

0797-92-U: The Amalgamated Transit Union Local 1633 (Applicant) v. The Corporation of the City of Wexford (Respondent) (*Withdrawn*)

0955-92-U: Tecumseh Products of Canada Limited (Applicant) v. C.A.W. Local 27, Dennett, Grant, Rendell et al., (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1201-89-U: Edith E. Bujold (Complainant) v. Roy Arnett, Richard Jones, Amalgamated Transit Union, Local 113, (Respondents) (*Withdrawn*)

2531-90-U: Ontario Nurses' Association (Complainant) v. Royalcrest Lifecare Inc. c.o.b. as Mississauga Life Care Centre (Respondent) v. Building Service Employees' International Union Local 204 (Intervener) (*Withdrawn*)

3043-90-U: The International Brotherhood of Electrical Workers Local 353, James McGuire, Bob Lappin, Bob Gilbert (Complainants) v. International Brotherhood of Electrical Workers, IBEW Construction Council of Ontario, Guild Electric Limited, Ainsworth Electric Ltd., Plan Electric Limited (Respondents) (*Dismissed*)

3122-90-U: Heather Dianne Vadum (Complainant) v. Hotel Employees Restaurant Employees Union Local 75, Toronto Hilton (Respondents) (*Granted*)

0033-91-U: Joseph, R. Crispo (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 18 Hamilton (Respondent) (*Withdrawn*)

0173-91-U: Peter Galiatsos (Complainant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Respondent) v. Famous Players Inc. (Intervener) (*Granted*)

0609-91-U: Bela Berta (Complainant) v. Amalgamated Transit Union, Local 113, (Respondent) v. Toronto Transit Commission, (Intervener) (*Dismissed*)

b1180-91-U: William D. Hudgins (Complainant) v. Canadian Brotherhood of Railway, Transport and General Workers (Respondent) (*Dismissed*)

1222-91-U; 2010-91-U: H. John Barnes (Complainant) v. Labourers' International, Local 527; Bernardino Carrozzi (Respondents) (*Dismissed*)

1612-91-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Racal-Chubb Canada Inc. (Respondent) (*Withdrawn*)

1615-91-U: United Brotherhood of Carpenters and Joiners of America, Local 2000 (Complainant) v. Canada Veneers Limited (Respondent) (*Dismissed*)

1772-91-U: Canadian Union of Public Employees (CUPE), Local 942 (Complainant) v. Royal Ottawa Hospital (Respondent) (*Withdrawn*)

2479-91-U: Canadian Union of Public Employees and its Local 576 (Complainant) v. The Ottawa Civic Hospital (Respondent) (*Withdrawn*)

2757-91-U: Marcel Fortin (Complainant) v. Mike Stewart Local 1425 Business Agent (Respondent) (*Dismissed*)

2974-91-U; 3507-91-U: United Steelworkers of America (Complainant) v. Nim Disposals Limited and Mid North Iron and Metals Limited c.o.b. as Northland Iron and Metal Limited (Respondents) (*Withdrawn*)

3089-91-U: United Food and Commercial Workers' International Union, Local 1000A (Complainant) v. Bavarian Meat Products Ltd. (Respondent) (*Withdrawn*)

3137-91-U: Teamsters Local Union 938 (Complainant) v. Rio Algom Ltd., Atlas Alloys Division (Respondent) (*Withdrawn*)

3241-91-U: Mary Borsboom (Complainant) v. CUPE Local 131 and (Respondent) v. Fairhaven Home for Senior Citizens (Intervener) (*Dismissed*)

3469-91-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Capital Supermarkets (1988) Limited c.o.b. LOEB I.G.A. Convent Glen (Respondent) (*Withdrawn*)

3796-91-U: Service Employees' International Union, Local 204 (Complainant) v. Istituto Nationali Per Il Commercio Estero (Italian Trade Commission) and Giorgio Neri (Respondents) (*Withdrawn*)

3843-91-U: The Canadian Union of Public Employees, Local 2723 Department of Public Works Transportation (Transit) (Complainant) v. The Corporation of the City of Burlington (Respondent) v. Canadian Union of Public Employees, Local 44 (Intervener) (*Withdrawn*)

3912-91-U: United Steelworkers of America (Complainant) v. Brampton Plate & Structural Steel Rolling Inc. (Respondent) (*Withdrawn*)

3974-91-U: The Canadian Union of Public Employees, Local 831 (Professional & Technical & Inside Bargaining Unit) (Complainant) v. The Corporation of the City of Brampton (Respondent) (*Withdrawn*)

4091-91-U: Donna J. Baker (Complainant) v. Stratford Festival (Respondent) (*Withdrawn*)

4092-91-U: Donna J. Baker (Complainant) v. Stratford Festival (Respondent) (*Withdrawn*)

4171-91-U: William B. Gahan (Complainant) v. Sandvick Tube (Respondent) (*Withdrawn*)

4172-91-U: Ontario Public Service Employees Union (Complainant) v. Community Living Huronia (Respondent) (*Withdrawn*)

0054-92-U: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Complainant) v. Labourers International Union of North America, Local 506, Metro Concrete Floors (1990) Inc. (Respondents) (*Dismissed*)

0110-92-U: The Canadian Union of Public Employees, Local 44 Public Works Group, Civic Operations Department, and Parks & Recreation Dept., Plant Operations & Parks (Complainant) v. The Corporation of the City of Burlington (Respondent) (*Withdrawn*)

0111-92-U: Alexander Furmanov (Complainant) v. Black & McDonald Ltd. & Local 787 (Respondents) (*Withdrawn*)

0198-92-U: Andrew Pietkiewicz (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Dismissed*)

0211-92-U: John Anthony Gallagher (Complainant) v. United Brotherhood of Carpenter's and Joiners of America Local #2000 and The Eddy Match Company Limited (Respondents) (*Withdrawn*)

0218-92-U: Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. 981884 Ontario Limited, (Respondents) (*Withdrawn*)

0237-92-U: The Former RNA'S of Mount Sinai Hospital (Complainant) v. Service Employees International Union, Local 204 (Respondent) (*Dismissed*)

0244-92-U: Operative Plasterers' and Cement Masons International Association of the United States and Canada Local 598 (Complainant) v. Labourers' International Union of North America Local 506, Ellis Don Limited (Respondents) (*Withdrawn*)

0269-92-U: Ray Dickson (Complainant) v. Teamsters Union Local 419 (Respondent) (*Withdrawn*)

0273-92-U: David Fraser (Complainant) v. William Neilson Ltd. (Respondent) (*Withdrawn*)

0284-92-U: IWA Canada, Local 2693 (Complainant) v. William Day Construction Limited., Gogama Forest Products, in Ostrom Township, McChesney Lumber Div.-E.B., Eddy Forest Prod., (Respondent) (*Withdrawn*)

0297-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Royal Taxi (Respondent) (*Withdrawn*)

0326-92-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Complainant) v. Armbro Material and Construction Ltd. (Respondent) (*Withdrawn*)

0347-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Zellers Incorporated (Respondent) (*Withdrawn*)

0356-92-U: Ontario Nurses' Association (Complainant) v. Oakville Lifecare Centre (Respondent) (*Withdrawn*)

0357-92-U: Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. 981884 Ontario Limited, (Respondents) (*Withdrawn*)

0367-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. LOEB I.G.A. (917921 Ontario Incorporated) (Respondent) (*Withdrawn*)

0371-92-U: Reliacare Inc. c.o.b. Port Dover Health Care Centre (Complainant) v. Ontario Nurses' Association, Judy Walters and Veronica Hagen (Respondents) (*Withdrawn*)

0421-92-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Canada Blue Tanning Company Limited and/or 681639 Ontario Limited (Respondents) (*Withdrawn*)

0428-92-U: United Steelworkers of America (Complainant) v. Comco Pipe and Supply Ltd. (Respondent) (*Withdrawn*)

0441-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Chi-Chi's Restaurant (Respondent) (*Withdrawn*)

0443-92-U: Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Marriot Corporation (Respondent) (*Withdrawn*)

0448-92-U: Albert Perciballi (Complainant) v. Roy Woolridge, Union President Sklar Furniture (Respondent) (*Withdrawn*)

0452-92-U: Canadian Union of Public Employees (Complainant) v. United Counties of Stormont, Dundas and Glengarry (Social Services Department) (Respondent) (*Withdrawn*)

0464-92-U: Canadian Union of Public Employee's Local's 44, 1540, 2723 (Complainant) v. Canadian Union of Public Employee's National Office (Respondent) (*Withdrawn*)

0497-92-U: Labourers' International Union of North America, Ontario Provincial District Council, Labourers International Union of North America Locals 183, 597, 1059, and 1081 (Complainant) v. Arnott Construction Limited (Respondent) (*Withdrawn*)

0506-92-U: Service Employees Union, Local 210 (Complainant) v. The Religious Hospitallers of St. Joseph operating as Villa Maria, Home for the aged (Respondent) (*Withdrawn*)

0555-92-U: Giuseppe Cozza (Complainant) v. Labourers' International Union of North America, Local 183 (L.I.U.N.A.) (Respondent) (*Withdrawn*)

0569-92-U: Wayne Wiggans (Complainant) v. CUPE Local 1320 (Respondent) (*Withdrawn*)

0584-92-U: Manuel C. Nogueira (Complainant) v. CUPE Local 2001 (Respondent) (*Withdrawn*)

0601-92-U: Hermann F. Franke (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0603-92-U: Stephen Judd (Complainant) v. Local 9 (15) of the International Leather Goods and Plastics and Novelty Workers Union, Morbern Inc. (Respondents) (*Withdrawn*)

0615-92-U: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Complainant) v. Kraken Electric Ltd. (Respondent) (*Withdrawn*)

0631-92-U: Lloyd Gallant (Complainant) v. International Beverage Dispensers and Bartenders Union (Respondent) (*Withdrawn*)

0634-92-U: Jeannette Jones, Pearl Dentinger, Suzette Woodcock, Deanna Heffernan, Mary Russell, (Complainants) v. William Love, Union representative for S.E.I.U. Local 183 (Respondent) (*Withdrawn*)

0656-92-U: Stanley Ramroop (Complainant) v. CWC Local 521 and Federal Pioneer Ltd., (Respondents) (*Withdrawn*)

0657-92-U: Frederick A. Fritz (Complainant) v. United Steelworkers of America - Local 6266 (Respondent) (*Withdrawn*)

0666-92-U: Christian Khodeir (Complainant) v. CUPE Local 2476, (Respondent) (*Withdrawn*)

0683-92-U: Ivan Jurcic (Complainant) v. Tim Fenton, Sheet Metal Workers' International Association, Local 397 (Respondent) (*Withdrawn*)

0684-92-U: Florence Schuster (Complainant) v. Greenwin Property Management (Respondent) (*Dismissed*)

0685-92-U: Florence Schuster (Complainant) v. L.I.U.N.A., Local 183 (Respondent) (*Withdrawn*)

0710-92-U: Claudio Aiello (Complainant) v. American Standard Inc. (Respondent) (*Dismissed*)

0711-92-U: Canadian Union of Public Employees, Local 1600 (CLC) (Complainant) v. Zoological Society of Metropolitan Toronto and Mandy Trickett (Respondents) (*Withdrawn*)

0727-92-U: Charles David McKay (Complainant) v. Canadian Auto Workers, Local 1986 and Butler Metal Products (Respondents) (*Withdrawn*)

0742-92-U: J. Zaidi (Complainant) v. Dowty Aerospace Toronto (Respondent) (*Dismissed*)

0744-92-U: Sandra Emslie (Complainant) v. The Hudson Bay Co. (Respondent) (*Dismissed*)

0749-92-U: Labourers' International Union of North America, Local 493 (Complainant) v. The Township of Ratter and Dunnet (Respondent) (*Withdrawn*)

0773-92-U: Ontario Public Service Employees Union (Complainant) v. Beechgrove Children's Centre (Respondent) (*Withdrawn*)

0793-92-U: Service Employees International Union, Local 204 (Complainant) v. Green Gables Manor Inc., Gerald Harquail, Percy Thadane and Lorraine Kitchen (Respondents) (*Withdrawn*)

0838-92-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO), (Complainant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent) (*Withdrawn*)

0884-92-U: Clarence Robert John French, (Complainant) v. Canadian Paperworkers Union, (Respondent) (*Withdrawn*)

0900-92-U: Mario Balzan, member of Local 598, (Complainant) v. Livio Balanzin Business agent of Local 598, (Respondent) (*Withdrawn*)

0913-92-U: Pat Ababio, (Complainant) v. Ontario Nurses Association (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO PROSECUTE

0798-92-U: The Amalgamated Transit Union Local 1633, (Applicant) v. The Corporation of the City of Welland (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

2663-87-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Complainant) v. Pigott Construction Limited (Respondent)

v. United Brotherhood of Carpenters and Joiners of America, Local 27; Labourers' International Union of North America, Local 506 (Interveners) (*Granted*)

0929-88-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Complainant) v. Labourers International Union of North America, Local 1089 and Foster Wheeler Limited (Respondents) v. Metropolitan Toronto Demolition Contractors Association (Intervener) (*Withdrawn*)

2436-90-JD: International Association of Bridge, Structural and Ornamental Ironworkers, Local 786 (Complainant) v. Sheaffer-Townsend Mechanical-Electrical Ltd., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Respondents) (*Granted*)

0177-91-JD: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 269, (Complainant) v. Blenkhorn & Sawle Limited, The Millwright District Council of Ontario on its own behalf and on behalf of Local 2309, and International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Respondents) (*Withdrawn*)

0353-91-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Complainant) v. Lamsar Mechanical Contractors Limited and Labourers' International Union of North America, Local 1089 (Respondents) (*Withdrawn*)

1059-91-JD: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Complainant) v. Sheet Metal Workers' International Association, Local 392, The Electrical Power Systems Construction Association, E Z Line Construction Ltd. (#882967 Ontario Ltd.) (Respondents) (*Withdrawn*)

2854-91-JD: Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 504, (Complainants) v. Felix Lopes Sheet Metal Ltd., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800, (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3084-90-M: Ontario Nurses' Association (Applicant) v. Carecor Health Services Inc., Ontario Hospital Association, Baycrest Hospital, Canadian Red Cross Blood Transfusion, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, (Respondents) (*Withdrawn*)

0244-91-M: Ontario Secondary School Teachers' Federation (Applicant) v. La section catholique du conseil scolaire de langue française d'Ottawa-Carleton and La section publique du conseil scolaire de langue française d'Ottawa-Carleton, (Respondents) (*Withdrawn*)

3607-91-M: Employees' Association of Ottawa Carleton, (Applicant) v. Carleton Roman Catholic Separate School Board, (Respondent) (*Withdrawn*)

3948-91-M: John Noble Homes, (Applicant) v. Ontario Nurses' Association, (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3120-90-OH: Don Laronde, (Complainant) v. Teck-Corona Operating Corporation, David Bell Mine, Marathon, Ontario, (Respondent) (*Dismissed*)

0209-92-OH: Leonard Perry (Complainant) v. Ab Cox Pontiac Buick GMC Ltd. (Respondent) (*Dismissed*)

0213-92-OH: Retail, Wholesale & Department Store Union, Local 461, (Complainant) v. Humpty Dumpty Foods Limited, (Respondent) (*Withdrawn*)

0378-92-OH: Raje Harwood (Complainant) v. Kinko's Copies Canada Limited (Respondent) (*Granted*)

0465-92-OH: Kirk Masters, (Complainant) v. Philip Enterprises Inc., (Respondent) (*Withdrawn*)

0559-92-OH: Guy Marlor, (Complainant) v. Bay Concrete Products (Respondent) (*Withdrawn*)

0590-92-OH: Maria Del-Rizzo & U.S.W.A., Local 8694, (Complainants) v. Elizabeth Frizza, Don Behm, Bill Connors, Bertrand Faure Ltd., (Respondents) (*Withdrawn*)

0618-92-OH: Susan V. Czop (Complainant) v. Crazy Lee's (Eastern) Limited (Respondent) (*Granted*)

0707-92-OH: John William Finlay, (Complainant) v. Bradcan Corporation, (Respondent) (*Dismissed*)

0724-92-OH: Brian Sebesta, (Complainant) v. Apollo 8 Maintenance Services Limited and Bramalea Limited, (Respondents) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2262-90-G: Labourers' International Union of North America, Local 527, (Applicant) v. Construction Gamicon, Division of 132554 Canada Inc., (Respondent) (*Withdrawn*)

2627-90-G: Sheet Metal Workers' International Association, Local 537, (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro, (Respondents) v. International Association of Bridge, Structural and Ornamental Iron Workers and International Association of Bridge, Structural and Ornamental Iron Workers, Local 736, (Intervener) (*Granted*)

3226-90-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Jarrett Commercial Contracting Ltd., (Respondent) (*Withdrawn*)

3285-90-G; 3411-90-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Blenkhorn and Sawle Limited, (Respondent) v. The Millwright District Council of Ontario on its own behalf and on behalf of Local 2309, Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 269, (Interveners); Sheet Metal Workers' International Association, Local 269 (Applicant) v. Blenkhorn & Sawle Limited, (Respondent) v. The Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Intervener) (*Withdrawn*)

3361-90-G: The Bricklayers, Masons Independent Union of Canada, Local 1, (Applicant) v. Marocco A. Masonry Ltd., (Respondent) (*Withdrawn*)

1748-91-G: Labourers' International Union of North America Ontario Provincial District Council and its Affiliated Local Unions, Labourers' International Union of North America, Local 1059 and 1081, (Applicant) v. Pickard Construction Co. Ltd. (Respondent) (*Withdrawn*)

3647-91-G: International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. 655789 Ontario Limited c.o.b. as Supreme Painting & Decorating Co., (Respondent) (*Granted*)

3710-91-G; 3711-91-G; 3712-91-G; 3713-91-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pritchard Consulting Services Incorporated, (Respondent); Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tamblyn-Pritchard-Johnston Construction Limited, (Respondent); Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tamblyn-Pritchard Management Inc., (Respondent); Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tamblyn-Pritchard Construction Inc., (Respondent) (*Withdrawn*)

3835-91-G: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Newman Bros. Limited, (Respondent) (*Withdrawn*)

3900-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041, (Applicant) v. Nation Drywall Contractors Ltd., (Respondent) (*Granted*)

3931-91-G: Marble, Tile & Terrazzo Union, Local #31, (Applicant) v. 944943 Ontario Limited c.o.b. as Terra Group International, (Respondent) (*Granted*)

4147-91-G: Labourers' International Union of North America, Local 837, (Applicant) v. Con-Drain Co. Ltd., (Respondent) (*Withdrawn*)

0064-92-G: International Union of Operating Engineers, Local 793, (Applicant) v. Campbell-Cox Limited, (Respondent) (*Withdrawn*)

0181-92-G: Labourers' International Union of North America, Local 837, (Applicant) v. Hollowcore Ltd., (Respondent) (*Granted*)

0186-92-G; 0187-92-G: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. The Rock Corporation of Canada Inc. and The Rock Corporation Ltd., (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. The Rock Corporation of Canada Inc. and The Rock Corporation Ltd. (Respondents) (*Granted*)

0240-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. York Air Conditioning Limited (Respondent) (*Withdrawn*)

0241-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Associated Mechanical Systems Inc., (Respondent) (*Withdrawn*)

0288-92-G: Teamsters Local Union No. 230, Ready Mix, Building Supplies, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Costa Earthmoving Co. Inc., (Respondent) (*Granted*)

0293-92-G; 0726-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. The State Group, (Respondent) v. The Millwright District Council of Ontario on its own behalf and on behalf of Local 1410, (Intervener); International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. The State Group (Respondent) (*Withdrawn*)

0320-92-G: International Union of Operating Engineers, Local 793, (Applicant) v. Serit Construction Ltd., (Respondent) (*Granted*)

0375-92-G: Drywall, Acoustic Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Eldom Drywall, (Respondent) (*Granted*)

0424-92-G: Drywall, Acoustic Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. RDS Royal Drywall Systems Inc., (Respondent) (*Granted*)

0431-92-G: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. G.C. Tech Electrical Services Ltd. (Respondent) (*Granted*)

0481-92-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 183, (Applicant) v. Arnott Construction Limited (Respondent) (*Withdrawn*)

0530-92-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Blue Mountain Flooring, (Respondent) (*Withdrawn*)

0531-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 785, (Applicant) v. P.J. Daly Limited, (Respondent) (*Withdrawn*)

0532-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 785, (Applicant) v. Hugo Hintz Construction Ltd., (Respondent) (*Granted*)

0533-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 785, (Applicant) v. W.G. Wood Sales, (Respondent) (*Granted*)

0548-92-G: International Brotherhood of Electrical Workers, Local Union 353, (Applicant) v. Amberland Electric, (Respondent) (*Granted*)

0549-92-G: International Brotherhood of Electrical Workers, Local Union 353, (Applicant) v. Aries Electrical Services Limited, (Respondent) (*Granted*)

0553-92-G: Sheet Metal Workers' International Association, Local 30, (Applicant) v. Vantage Sheet Metal, (Respondent) (*Granted*)

0556-92-G: Labourers' International Union of North America, Local 1059, (Applicant) v. Matthews Contracting Inc., (Respondent) (*Withdrawn*)

0570-92-G; 0572-92-G: The Ontario Allied Construction Trades Council, and the Labourers' International Union of North America Local 183, (Applicant) v. The Electrical Power Systems Construction Association and Comstock Canada, (Respondents) (*Withdrawn*)

0571-92-G: The Ontario Allied Construction Trades Council, and the Labourers' International Union of North America, Local 183, (Applicant) v. The Electrical Power Systems Construction Association and Comstock Canada, (Respondents) (*Withdrawn*)

0573-92-G: The Ontario Allied Construction Trades Council, and The Labourers' International Union of North America, Local 183, (Applicant) v. The Electrical Power Systems Construction Association and Comstock Canada, (Respondents) (*Dismissed*)

0585-92-G: International Union of Operating Engineers, Local 793, (Applicant) v. Mar-San Excavating & Grading Ltd., (Respondent) (*Granted*)

0591-92-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. E. Beland Masonry Limited, (Respondent) (*Granted*)

0608-92-G: International Union of Operating Engineers, Local 793, (Applicant) v. Wonnacott Excavating Ltd. (Respondent) (*Granted*)

0610-92-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Seaton Creative Interiors Ltd., (Respondent) (*Withdrawn*)

0612-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Emerald Contracting, (Respondent) (*Withdrawn*)

0614-92-G: Sheet Metal Workers' International Association, Local 504, (Applicant) v. Richards Mechanical Services Ltd., (Respondent) (*Granted*)

0620-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041, (Applicant) v. Olympic Drywall & Acoustics Co. Ltd., (Respondent) (*Withdrawn*)

0622-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041, (Applicant) v. Valley Interiors Ltd. and Jumeo Corporation, (Respondents) (*Withdrawn*)

0627-92-G: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 172, Restoration Steeplejacks, (Applicant) v. Polymeric Engineering Limited, (Respondent) (*Withdrawn*)

0635-92-G: International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Keet-A-Co. Ltd., (Respondent) (*Granted*)

0650-92-G: Labourers' International Union of North America, Local 493, (Applicant) v. Bot Construction Ltd., (Respondent) (*Withdrawn*)

0678-92-G: Labourers' International Union of North America, Local 527, (Applicant) v. Eastern Concrete Drilling, (Respondent) (*Granted*)

0682-92-G: Labourers' International Union of North America, Local 607, (Applicant) v. V.K. Mason Construction Ltd., (Respondent) (*Withdrawn*)

0691-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Van Mechanical Contractors Ltd., (Respondent) (*Granted*)

0697-92-G: Metropolitan Toronto Demolition Contractors Inc., (Applicant) v. Delsan Demolition Limited and Environmental Abatement Services Inc., (Respondents) (*Dismissed*)

0702-92-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Montreal Parquetry Floors Ltd. and Montreal Parquetry Floors (Toronto) Inc., (Respondent) (*Granted*)

0714-92-G: Sheet Metal Workers' International Association, Local 504, (Applicant) v. Thornton Steel Ltd., (Respondent) (*Granted*)

0718-92-G: Labourers' International Union of North America, Local 1036, (Applicant) v. Soo Coring and Sawing Corp., (Respondent) (*Dismissed*)

0721-92-G: International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. E. Beland Masonry Limited, (Respondent) (*Withdrawn*)

0732-92-G: International Brotherhood of Painters and Allied Trades, Local 1904, (Applicant) v. Norev Sandblasting Ltd., (Respondent) (*Granted*)

0734-92-G; 0736-92-G: Sheet Metal Workers' International Association, Local 269, (Applicant) v. French Brothers Roofing and Sheet Metal Ltd., #907920 Ontario Inc., c.o.b. as French Brothers Roofing Belleville, (Respondents) (*Withdrawn*)

0770-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. National Decor, (Respondent) (*Withdrawn*)

0774-92-G; 0739-92-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, (Applicant) v. Superior Siding & Steel Ltd., (Respondent) (*Granted*)

0789-92-G: International Brotherhood of Electrical Workers, Local Union 353, (Applicant) v. Northview Electrical Contractors, (Respondent) (*Withdrawn*)

0792-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Asbury Mechanical, (Respondent) (*Granted*)

0795-92-G: Lake Ontario District Council of the United Brotherhood of Carpenters and Joiners of America and the Carpenters & Allied Workers of America, Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicants) v. Formcrete Contracting Limited and Tony Marcantonio carrying on business as Marcon Construction, (Respondent) (*Granted*)

0813-92-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen - Local 4, (Applicant) v. Shadeland Masonry (Respondent) (*Granted*)

0846-92-G: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Lume Masonry Ltd., (Respondent) (*Withdrawn*)

0873-92-G: Labourers' International Union of North America, Local 837, (Applicant) v. Stradiotto Masonry, (Respondent) (*Withdrawn*)

0951-92-G: Sheetmetal Workers' International Association and Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 397, 473, 504, 537, 539 & 562 (Applicant) v. Kool-Temp Air Conditioning, Refrigeration & Heating Limited, (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1733-91-G; 1734-91-G: International Union of Bricklayers and Allied Craftsmen, Local 8, (Applicant) v. Novo Mundo Construction Ltd., (Respondent); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Novo Mundo Construction Ltd., (Respondent) (*Granted*)

1946-91-R: Employees of Canon Inc. Plastics Division of Etobicoke, Carlingview Drive 324, (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, (Respondent) v. Canon Inc., Pipe Division, (Intervener) (*Dismissed*)

1989-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. Robertson Yates Corporation Limited, (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, (Intervener) (*Dismissed*)

3167-91-R: Rosetta Luciani, (Applicant) v. The Hotel Employees: Restaurant Employees Union, Local 775 of the Hotel Employees, Restaurant Employees International Union, (Respondent) v. Cara Operations Limited, (Intervener) (*Dismissed*)

3419-91-U: Marsha Gail Kriss, (Applicant) v. C.U.P.E., Local 79 (Respondent) v. The Municipality of Metropolitan Toronto, (Intervener) (*Dismissed*)

3558-91-G: International Brotherhood of Electrical Workers, Local Union 353, (Applicant) v. Aries Electric Services Ltd., (Respondent) (*Granted*)

3645-91-R: Joe Colavecchia, (Applicant) v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada ("CAW - TCA") and its Local 252, (Respondent) v. Willow Manufacturing Co. Ltd., (Intervener) (*Dismissed*)

4098-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. Modern Trend Design & Interior Renovations, (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

CASON
LR
-054

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1992



ONTARIO LABOUR RELATIONS BOARD

Chair M.G. MITCHNICK

Alternate Chair R.O. MACDOWELL

Vice-Chairs

M. BENDEL
J.B. BLOCH
L. DAVIE
N.V. DISSANAYAKE
O.V. GRAY
B. HERLICH
R.J. HERMAN
R.D. HOWE
J. JOHNSTON
B. KELLER
P. KNÖPF
S. LIANG
J. McCORMACK
M.A. NAIRN
K. O'NEIL
K. PETRYSHEN
N.B. SATTERFIELD
I.M. STAMP
G. SURDYKOWSKI
S.A. TACON

Members

J. ANDERSON	W.S. O'NEILL
B.L. ARMSTRONG	D.A. PATTERSON
C.A. BALLENTINE	H. PEACOCK
W.A. CORRELL	R.W. PIRRIE
K.S. DAVIES	F.B. REAUME
A.R. FOUCAULT	J. REDSHAW
W.N. FRASER	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.R. MONTAGUE	N.A. WILSON
J.W. MURRAY	D.G. WOZNIAK

Registrar T.A. INNISS

Board Solicitors R. LEBI
K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1992] OLRB REP. AUGUST

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	Alpa Wood Mouldings Company, a Division of Alpa Lumber Inc.; Re Carpenters & Allied Workers, Local 27, C.J.A.....	891
2.	Camaro Enterprises Limited; Re I.U.O.E. Local 793; Re Group of Employees	901
3.	Chateau Gardens Queens, Mercedes Corporation c.o.b. as; Re C.L.A.C.; Re London and District Service Workers' Union, Local 220	906
4.	EPSCA, Ontario Hydro, U.A., Local 46; Re B.S.O.I.W., Local 721	915
5.	Harc Incorporated; Re O.P.S.E.U.	938
6.	Hurley Corporation; Re L.I.U.N.A.; Re Group of Employees.....	940
7.	Muller's Meats Limited; Re Muller's Meats Employees Association; Re R.W.D.S.U. AFL:CIO:CLC	942
8.	Paperboard Industries Corporation and Specialized Packaging Products Ltd.; Re C.P.U., Local 1150	946
9.	Riverside Fabricating Limited; Re National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada); Re Group of Employees	958
10.	Township of Lake of Bays; Re Graham Johnson, O.P.S.E.U.	970
11.	Walden Roofing & Sheet Metal Co. Limited; Re Donald Feener; Re S.M.W. Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562	971
12.	Whitler Industries Limited; Re Roger Kennedy	977

SUBJECT

Adjournment - Discharge - Health and Safety - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the <i>Occupational Health and Safety Act</i> - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace	
WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY.....	977
Certification - Charges - Petition - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing	
RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....	958
Certification - Collective Agreement - Timeliness - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken	
MULLER'S MEATS LIMITED; RE MULLER'S MEATS EMPLOYEES ASSOCIATION; RE R.W.D.S.U. AFL:CIO:CLC	942
Certification - Construction Industry - Dependent Contractor - Employer - Whether certain individuals or entities properly characterized as "employees" or "dependent contractors", or as "independent contractors" - Board finding certain entities not dependent on respondent employer and therefore "independent contractors" - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the <i>Act</i> - Certificates issuing	
ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, C.J.A.....	891
Certification - Construction Industry - Petition - Petitioner's own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the petitioning activities to the employer - Board according no weight to petition - Certificate issuing	
CAMARO ENTERPRISES LIMITED; RE I.U.O.E. LOCAL 793; RE GROUP OF EMPLOYEES.....	901

II

Certification - Construction Industry - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect	
HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES	940
Certification - <i>Hospital Labour Disputes Arbitration Act</i> - Interest Arbitration - Pre-Hearing Vote - Timeliness - Interest arbitration award on "central issues" issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - "Local issues" arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after "central issues" award - Board directing that ballots cast in pre-hearing vote be counted	
CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220	906
Charges - Certification - Petition - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing	
RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES	958
Collective Agreement - Certification - Timeliness - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken	
MULLER'S MEATS LIMITED; RE MULLER'S MEATS EMPLOYEES ASSOCIATION; RE R.W.D.S.U. AFL:CIO:CLC	942
Construction Industry - Certification - Dependent Contractor - Employer - Whether certain individuals or entities properly characterized as "employees" or "dependent contractors", or as "independent contractors" - Board finding certain entities not dependent on respondent employer and therefore "independent contractors" - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the <i>Act</i> - Certificates issuing	
ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, C.J.A.	891
Construction Industry - Certification - Petition - Petitioner's own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the	

petitioning activities to the employer - Board according no weight to petition - Certificate issuing

CAMARO ENTERPRISES LIMITED; RE I.U.O.E. LOCAL 793; RE GROUP OF EMPLOYEES 901

Construction Industry - Certification - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect

HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES 940

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an "international trade agreement", nor a "local agreement" binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721 915

Construction Industry - Representation Vote - Termination - Board applying reasoning of *Crete Flooring Group* decision to termination representation votes in construction industry - Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date

WALDEN ROOFING & SHEET METAL CO. LIMITED; RE DONALD FEENER; RE S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562 971

Dependent Contractor - Certification - Construction Industry - Employer - Whether certain individuals or entities properly characterized as "employees" or "dependent contractors", or as "independent contractors" - Board finding certain entities not dependent on respondent employer and therefore "independent contractors" - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, C.J.A. 891

Discharge - Adjournment - Health and Safety - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY 977

IV

Employer - Certification - Construction Industry - Dependent Contractor - Whether certain individuals or entities properly characterized as “employees” or “dependent contractors”, or as “independent contractors” - Board finding certain entities not dependent on respondent employer and therefore “independent contractors” - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA.....

891

Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an “international trade agreement”, nor a “local agreement” binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721

915

Health and Safety - Adjournment - Discharge - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY.....

977

Hospital Labour Disputes Arbitration Act - Certification -Interest Arbitration - Pre-Hearing Vote - Timeliness - Interest arbitration award on “central issues” issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - “Local issues” arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after “central issues” award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE
C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL
220

906

Interest Arbitration - Certification - *Hospital Labour Disputes Arbitration Act* - Pre-Hearing Vote - Timeliness - Interest arbitration award on “central issues” issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - “Local issues” arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within

60 days preceding March 31, 1992 or, alternatively, within 90 days after “central issues” award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS’ UNION, LOCAL 220

906

Intimidation and Coercion - Certification - Charges - Petition - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors’ charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors’ efforts to persuade them to contrary view - Certificate issuing

RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....

958

Jurisdictional Dispute - Construction Industry - Evidence - Practice and Procedure - Ironworkers’ union and Plumbers’ union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an “international trade agreement”, nor a “local agreement” binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721

915

Petition - Certification - Charges - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors’ charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors’ efforts to persuade them to contrary view - Certificate issuing

RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....

958

Petition - Certification - Construction Industry - Petitioner’s own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees’ work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the petitioning activities to the employer - Board according no weight to petition - Certificate issuing

CAMARO ENTERPRISES LIMITED; RE I.U.O.E. LOCAL 793; RE GROUP OF EMPLOYEES.....

901

Petition - Certification - Construction Industry - Practice and Procedure - At conclusion of objecting employees’ evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect

HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES.....

940

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an "international trade agreement", nor a "local agreement" binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work	
EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721	915
Practice and Procedure - Certification - Construction Industry - Petition - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect	
HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES	940
Practice and Procedure - Unfair Labour Practice - Board directing pre-hearing filing of respondent employer's reply to union's unfair labour practice complaint, as well as disclosure of documents - Union directed to fully particularize complaint and to supply employer with documents upon which it intends to rely - Both parties directed to indicate number of witnesses to be called and estimated number of hearing days required - Board directing pre-hearing conference with parties and counsel	
TOWNSHIP OF LAKE OF BAYS; RE GRAHAM JOHNSON, O.P.S.E.U.	970
Pre-Hearing Vote - Certification - <i>Hospital Labour Disputes Arbitration Act</i> - Interest Arbitration - Timeliness - Interest arbitration award on "central issues" issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - "Local issues" arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after "central issues" award - Board directing that ballots cast in pre-hearing vote be counted	
CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220	906
Remedies - Adjournment - Discharge - Health and Safety - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the <i>Occupational Health and Safety Act</i> - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace	
WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY	977
Representation Vote - Construction Industry - Termination - Board applying reasoning of <i>Crete Flooring Group</i> decision to termination representation votes in construction industry -	

Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date	
WALDEN ROOFING & SHEET METAL CO. LIMITED; RE DONALD FEENER; RE S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562	971
Sale of a Business - Board determining that acquisition by "S" of certain assets of "P" at plant near Bradford and assignment to S of P's lease for those premises constituting sale of a business - Board declaring that S bound by union's collective agreement with P	
PAPERBOARD INDUSTRIES CORPORATION AND SPECIALIZED PACKAGING PRODUCTS LTD.; RE C.P.U., LOCAL 1150	946
Termination - Construction Industry - Representation Vote - Board applying reasoning of <i>Crete Flooring Group</i> decision to termination representation votes in construction industry - Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date	
WALDEN ROOFING & SHEET METAL CO. LIMITED; RE DONALD FEENER; RE S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562	971
Termination - Employer requesting that Board terminate bargaining rights on basis that union did not give notice to bargain within 60 days of certification - Board finding delay in giving notice not lengthy and that explanation given by union indicating inadvertence rather than intention to sleep on its rights - Employer suffering no prejudice from union's conduct - Application dismissed	
HARC INCORPORATED; RE O.P.S.E.U.	938
Timeliness - Certification - Collective Agreement - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken	
MULLER'S MEATS LIMITED; RE MULLER'S MEATS EMPLOYEES ASSOCIATION; RE R.W.D.S.U. AFL:CIO:CLC	942
Timeliness - Certification - <i>Hospital Labour Disputes Arbitration Act</i> - Interest Arbitration - Pre-Hearing Vote - Interest arbitration award on "central issues" issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - "Local issues" arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after "central issues" award - Board directing that ballots cast in pre-hearing vote be counted	
CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220	906
Unfair Labour Practice - Practice and Procedure - Board directing pre-hearing filing of respondent employer's reply to union's unfair labour practice complaint, as well as disclosure of documents - Union directed to fully particularize complaint and to supply employer with documents upon which it intends to rely - Both parties directed to indicate number of witnesses to be called and estimated number of hearing days required - Board directing pre-hearing conference with parties and counsel	
TOWNSHIP OF LAKE OF BAYS; RE GRAHAM JOHNSON, O.P.S.E.U.	970

VIII

Witness - Adjournment - Discharge - Health and Safety - Remedies - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and another employee, in violation of section 50(1) of the <i>Occupational Health and Safety Act</i> - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace	
WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY	977

2208-90-R Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. **Alpa Wood Mouldings Company**, a division of Alpa Lumber Inc., Respondent

Certification - Construction Industry - Employer - Dependent Contractor - Whether certain individuals or entities properly characterized as “employees” or “dependent contractors”, or as “independent contractors” - Board finding certain entities not dependent on respondent employer and therefore “independent contractors” - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the Act - Certificates issuing

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *W. N. Fraser* and *I.J. Redshaw*.

APPEARANCES: *David A. McKee* and *Luis Camara* for the applicant; *Roy Filion* and *John Lewis* for the respondent.

DECISION OF THE BOARD; August 11, 1992

1. This is an application made under the construction provisions of the *Labour Relations Act* (“the Act”). The applicant is a trade union within the meaning of section 1(1) (formerly 1(1)(p)) of the Act and is an affiliated bargaining agent of the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America designated employee bargaining agency. The applicant seeks, pursuant to section 146(1) of the Act, to be certified as the exclusive bargaining agent for carpenters and carpenters apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham. (Board Area 8).

2. The issues in dispute between the parties can be characterized as follows. The respondent Alpa Wood Mouldings Company, a division of Alpa Lumber Inc. (“Alpa”) asserts that the applicant Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (“the Union”) should not be certified as bargaining agent because, on November 21, 1990, the date the application was made, Alpa did not employ any employees in the bargaining unit which the union seeks to represent. Alpa submits that the individuals whom the union added to the list and characterizes as “employees” or alternatively “dependent contractors” were in fact “independent contractors” engaged as subcontractors by Alpa. Further, those individuals whom the union characterizes as “dependent contractors”, employed helpers on the date of the application. Consequently, “dependent contractors”, who have employees, are by the operation of law “independent contractors”. The Union asserts that the six individuals Alpa added to the list after the first officer’s meeting, are either “independent contractors” or were not working on the date of the application. (See the October 3 1991 decision of a differently constituted panel of the Board).

3. By decision of the Board a Labour Relations Officer was appointed to inquire into the list and composition of the bargaining unit. The officer appointed conducted the usual inquiries and examinations and prepared a report for the Board. The Board convened a hearing on Wednes-

day, May 13, 1992 wherein the parties filed written submissions and made oral representations with respect to the conclusions which the Board ought to reach as a result of that report and on the basis of the relevant jurisprudence.

4. There are twelve persons whose status is in dispute. The list is made up of six individuals added by the Union and six individuals added by Alpa. The issue of onus was raised and argued before the panel. The panel adopts the test found in *E. & E. Seegmiller Limited* [1991] OLRB Rep. Oct. 1124 at paragraph 16:

In our view, however, questions such as this are best decided by answering the following question: "Is it more probable than not, on the evidence, that the person in dispute was an employee in the bargaining unit during the times material to the Board's considerations?" Fashioning an answer to this question may well involve various onuses, but the answer will ultimately depend upon an assessment of the evidence before the Board.

5. Alpa and the Union agree that Aderito Salvador, John Salvador, partners in JA Salvadore Carpentry Ltd. ("JA Salvadore") Carlos Rodrigues, a helper in JA Salvador, Mauricio Santos, and Ricardo Ferreira, partners in M.R. Finish Carpentry "M.R." and Antonio Carlos Bravin a helper with M.R. were on an Alpa site within Board Area #8, performing finish or trim carpentry work, on the application date. However the Union challenges the inclusion on the list of John Ridgewell, Robert Martin, Fiore Desantis, the principal in Desan Carpentry ("Desan"), Dave Chew, the owner of Carewood Contracting Inc. ("Carewood") Sam Porco, and Oscar Bazzone partners in Ontario Carpentry Contractors (Ontario Carpentry) on the basis that they were not at work on the application date. For the purpose of this decision it is unnecessary for the panel to make a finding of whether Dave Chew (Carewood), Sam Porco and Oscar Bazzone (Ontario Carpentry), were at work on the application date. The viva- voce evidence relating to John Ridgewell and Robert Martin is contradictory. Exhibit 37 is an invoice from Ridgewell and Martin to Alpa, regarding first trim completed on two houses. This invoice, is the only invoice adduced in evidence, that covers a two week period, ending on November 30, including the application date. The evidence discloses that the pair could complete first trim work on two and one-half houses in a day. Martin could not remember if he worked any days in November. Ridgewell testified he worked every day in November save one. During the last two weeks in November, which includes the application date, only one day's work was performed. Martin testified he worked every day until the work was finished. Therefore the Board finds that Martin and Ridgewell worked continuously until the 17th of November. They were not at work on the application date. With respect to Fiore Desantis, the evidence shows unequivocally that he was at work on November 21.

6. The parties agree that there were five distinct entities or groupings working for Alpa in and around the application date. Each of these entities can be loosely defined as a piecework crew. These piecework crews were contracted by Alpa to do first and second trim carpentry on various houses on sites in Board Area #8. Each piecework crew has a different relationship with Alpa. The relationship between Alpa and the various piecework crews, when analyzed, form the indicia necessary to determine whether the relationship is one of dependence or independence.

7. The Act defines a dependent contractor in the following manner:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

The Board in *Adbo Contracting Company Ltd.* [1977] OLRB Rep. April 197 reviewed the policy reasons behind the Legislature's decision to create the category of "dependent contractor":

17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines Investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.

20. The problem of drawing a distinction in this area is not a new one for this Board. The case of *Livingston Transportation Ltd.*, [1972] OLRB Rep. May 488 provides a good example of the difficulties faced by the Board when determining the outer limits of the Act. The question before the Board was whether certain truck owners were employees or independent contractors. In answering that question, the Board alluded to no less than four approaches that might be taken:

- 1) resort to the control test used for determining the vicarious liability of an employer;
- 2) use of the four-fold test adopted by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, et al [1947] 1 D.L.R. 101, a case concerning liability for municipal taxation;
- 3) simply asking the question of whose business is it;
- 4) application of what was referred to as "the statutory purpose test".

The multiplicity of approaches that emerged in the *Livingston* case is some evidence of the problems that then faced the Board when identifying the outer limits of the Act. Fortunately, there is now a new point of departure for distinguishing between the individual worker and the true entrepreneur.

21. The *Labour Relations Act*, having been amended in 1975, now provides a single, and less confusing, approach to the problem. Section 1 of the Act has been amended to provide that the term "employee" includes a "dependent contractor". That same section defines dependent contractor as "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and

conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of independent contractor". Section 6 of the Act, moreover, has been amended to provide that "[a] bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit".

22. We do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board's existing jurisprudence, such as *Livingston Transportation*. In those cases, the question had to be framed in terms of whether a person was an employee or an independent contractor. The Board, as a result, placed emphasis on the fourfold test as set out in *Montreal Locomotive Works*. The appropriateness of this test for determining the outer limits of a collective bargaining statute was always questionable. This concern has been best put by Dean Arthurs in his perceptive article, "The Dependent Contractor: A study of the Legal Problems of Countervailing Power" (1965), U.T.L.J. 89. At page 94, he comments:

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material. The pertinent question is whether the factors in an employment relationship which invoke vicarious liability bear any relation to those which invite a regime of collective bargaining. The very terminology - "master" and "servant" - evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial independence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose. Indeed, the Ontario Board in the *Telegram* case recognized this fact: "[T]he elements to be considered are not alone those that were established for the purpose of determining whether an employer is vicariously responsible for the tortious acts of his servants, but those as well that have a bearing on the labour relations aspects of the relationship. ..." Yet the *Montreal Locomotive* test was adopted by the Ontario board in the *Telegram* case, and has been followed ever since.

23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

28. In the instant case, the facts point to the complainants being dependent economically upon the respondent Pasinato. This economic dependence arose because Pasinato, and the other brokers like him, were the almost exclusive source of work for the complainants. Four of the complainants, moreover, had relied upon Pasinato almost exclusively to supply them with work during the year prior to the events giving rise to this complaint. The fact that the relationship between Pasinato and Fidanza may have been more transitory, moreover, does not necessarily put it outside the purview of section 1 (ga) of the Act. The question is whether the economic dependence is roughly analogous to that of the employee working in the same economic sector. Fidanza, and the other complainants, were all performing work in the construction sector, an area in which employment relationships have always been less permanent than in the industrial sector. Using this analogy, we find that in this case the transitory nature of the relationship between Fidanza and Pasinato does not make Fidanza any less a dependent contractor than the other four complainants.

8. The Board in *Carpino Carpentry Ltd.* [1991] OLRB Rep. March 306, reviewed at paragraph 12 through 16 the relevant case authorities and indicia to be applied in a case respecting the finish carpentry industry:

12. The purpose and history of the "dependent contractor" provision has been well summarized in previous Board decisions (see, for example, *Atway Transport Inc.*, [1989] OLRB Rep. June 590, at paragraphs 44 and 45). We find it unnecessary to review that history in this case. As the Board's jurisprudence demonstrates, it can be quite difficult to distinguish between "dependent" and "independent" contractors. This is particularly true in the construction industry which, in Ontario, is very craft or trade oriented. It is essential that an assessment of whether an individual is a dependent or an independent contractor be made having regard to the context of the craft or trade in the sector of the construction industry in which the individual is engaged.

13. There have been many previous cases before the Board in which it has been alleged that persons who considered themselves to be self-employed were "independent contractors". In circumstances where such persons were essentially "labour only" subcontractors paid on a piece work basis to install someone else's materials on someone else's job site(s), they have been found to be dependent contractors (see, for example, *Mr. Seamless Eavestroughing Thunder*

Bay Limited, [1974] OLRB Rep. Dec. 875, *Mo-Mek Systems Ltd.*, [1974] OLRB Rep. Oct. 642, *Toronto Drywall Services*, [1976] OLRB Rep. Oct. 645, *Ofira Construction*, (Board File No. 1051-81-R, July 19, 1982, unreported), *Supreme Carpentry Inc.*, [1989] OLRB Rep. Nov. 1181, *GM Finishing Inc.*, (Board File No. 1611-89-R, February 28, 1990, unreported) among others). In that respect, the circumstances before the Board in *Supreme Carpentry Inc.* and *GM Finishing Inc.*, *supra*, were very much like those of Manuel and Tony Fernandes in this case.

14. The tools owned by Manuel and Tony Fernandes are the tools of their trade in the residential sector of the construction industry. Vehicles, such as the van which they own are also typical. Nor is the fact that they provide their own nails significant. It is not uncommon for employees working at a piecework rate in residential construction to provide some consumable materials at their own cost. In effect, Manuel and Tony Fernandes were doing no more than supplying their labour, through their partnership, to the respondent, as a fixed price per unit. Supplying labour is what employees do.

15. Although the partners engage in work as it is available and are not restricted to working for the respondent alone, this sort of mobility is common in residential construction. Nor do they advertise or otherwise seek business as such. In addition, the evidence reveals that Manuel and Tony Fernandes spent a substantial portion of their time working for the respondent at the material times. There was little real bargaining between Manuel and Tony Fernandes and the respondent. In effect, they receive the “going rate” of remuneration and work under conditions typical of construction in the residential sector.

16. Because they are paid on a piece work basis Manuel and Tony Fernandes’ working hours are very much driven by the economic relationship. The fact that they are paid at the end of each month for the houses they have completed also suggests a dependency relationship. The fact that they deduct certain expenses for income tax purposes does not, by itself, indicate they are independent contractors. On the evidence before the Board, such expenses could as easily be legitimate employment expenses as they could be business expenses. It is not surprising that Manuel and Tony Fernandes receive little supervision from the respondent. Being skilled workers, they require no real supervision in a traditional sense. The manner in which Manuel and Tony Fernandes obtain work suggests that they are pursuing employment rather than business opportunities. Finally, there is no real opportunity for Manuel and Tony Fernandes to make a profit in a business sense and no real risk of loss for them in their relationship with the respondent.

9. In reviewing the evidence in the reports concerning the “dependence” or “independence” of the five entities working for Alpa on or about the application date, the Board finds that Carewood, Ontario Carpentry and JA Salvador were at all material times independent contractors. All three entities had relationships with other builders such that they were not dependent on Alpa for their work. An example of this is that JA Salvador left another job site with another company B&T trimming to take the contract with Alpa because it paid more. As well, both Ontario Carpentry and Carewood had other job sites on the go with other builders in Board Area #8.

10. The Board is satisfied that the principal of “Desan” fits the criteria of “dependent contractor” as set out in the above noted jurisprudence. The relationship between Alpa, and the partners and employee of “M.R.”, on its face fit most of the indicia of the dependent contractor test. However, when looking at the indicia, one of the factors that must be reviewed is the impact of M.R.’s “helper” on the relationship between Alpa and the partners of M.R. M.R. was formed at the request of Larry Trottier of Cadillac. Alpa took the job sites over from Cadillac for reasons which do not affect this application for certification. Alpa continued to use Cadillac’s crews, and part of Cadillac’s management team including Larry Trottier. There was no negotiation about prices. Houses were assigned by Alpa on a piece-work basis. Richard Ferreira and Maurizio Santos, partners in M. R., and Carlos Bravin their helper worked on a piece-work remuneration basis. They supplied their own tools, nails and glue. Alpa supplied the lumber. Alpa directed them to work on certain houses. Alpa directed them to fix deficiencies. Invoices were prepared by Alpa. Alpa paid the WCB premiums, which included the coverage of their “helper”. There were no

employee deductions or holdbacks pursuant to the *Construction Lien Act*. M.R. has no phone listing or business card. M.R.'s partners and helper worked exclusively for Cadillac and then Alpa, when Alpa, took over the sites. They did not have either real opportunity for profit or risk of loss. This relationship was one of economic dependence. The relationship, at all material times, was more like employee and employer rather than that of client independent contractor. In all other respects, save and except the impact of the "Helper" analysis on the relationship between Alpa and the partners of "M.R.", Richard Ferreira and Mauricio Santos would be found to be dependent contractors. The Board finds, that with respect to the economic dependence criteria there is no substantial factual basis on which to distinguish the relationship between Alpa and Richard Ferreira and Mauricio Santos and Alpa and Fiore Desantis the only principal in Desan. In conclusion, at all material times, the relationship between Fiore Desantis and Alpa was more like employee and employer rather than that of client independent contractor.

11. The Board's jurisprudence is replete of situations which analyze the labour relations impact of a "dependent contractor" hiring a helper. In *Canada Crushed Stone* [1977] OLRB Rep. Dec. 806, the Board was required to decide whether an owner and operator of ten trucks who employed drivers to operate the trucks was a "dependent contractor". The Board noted that the issue of economic dependence was not the only indicia of dependence, in some cases, the employment of others is as important a factor in defining the relationship. The Board asked whether the employment of others is a factor which in and of itself colours the character of the business so as to remove its owner beyond the scope of the dependent contractor provision. In reaching its conclusion, the Board made the following comments.

20. In seeking to draw the line in such a way as to bring within the Act those dependent contractors who by the nature of their business more closely resemble employees and to exclude those who more closely resemble independent contractors the Board has been struck by the qualitative difference between the contractor who derives income from the labour of others and the contractor who does not. The Board takes the view that the line must be drawn so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the Act they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of The Labour Relations Act.

• • • •

22. If the Board was to extend the benefits of *The Labour Relations Act* to certain employers simply because of their economic dependency, the result would be to create the very potential for conflict of interest which the Act is designed to prevent. The constitution of the applicant in this matter extends membership eligibility to both dependent contractor-employers and to the employees of these persons conditional upon a finding by the Board that they are "employees" for purposes of the Act. If the applicant were to organize the employees of one of these dependent contractor-employers, the anomalous situation of an employer and his employees belonging to the same union would exist. (See *Dr. George A. Morgan U.A.W. Dental Centre*, [1977] OLRB Rep. Jan. 1.) The Act must be interpreted in such a way as to avoid the potential for conflict of interest which might thus develop if dependent contractor-employers were found to be "dependent contractors" within the meaning of the Act.

23. Having decided that the line should be drawn to exclude dependent contractor-employers from the meaning of "dependent contractor" as defined in Section 1(ga) of the Act, the Board must emphasize that its decision in this regard is intended to exclude only dependent contractors who are employers in substance as well as form. It is this type of dependent contractor who more closely resembles an independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline, and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of The Labour Relations Act. If, however, it is found that a dependent contractor does not possess this

type of authority, then, notwithstanding the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under The Labour Relations Act.

The Board, in *Hamilton Yellow Cab Company Limited* [1987] OLRB Rep. Nov. 1373, found a fill-in driver in the taxi industry, not to be an entrepreneurial endeavour which on its own would change the status of the “dependent contractor” relationship:

52. The use of a helper or “fill-in worker” to lighten the load of a person alleged to be a dependent contractor has never been considered, by itself, to be an entrepreneurial endeavour which would create a situation more closely resembling an independent contractor than an employee or would preclude involvement in collective bargaining. (See: *Comfort Guard Service Ltd.*, [1978] OLRB Rep. Oct. 905, *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083, *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198, and *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398.) In *Dominion Dairies Limited* the Board put the problem this way:

The line between contractors whose activities are more closely analogous to those of a wage earner, so as to make them dependent contractors, and contractors who are sufficiently entrepreneurial as to be excluded from that definition is not easy to draw. It can only be drawn in the light of the facts of each particular case. In *Canada Crushed Stone* the Board found that a contractor who owned 10 trucks which were driven by seven employees in an aggregate material hauling business that grossed \$250,000 per year was not, by virtue of the entrepreneurial nature of his business, a dependent contractor within the meaning of the Act. In a more recent decision, *Comfort Guard Services Ltd.* (Board File No. 2007-77-R, as yet unreported, Oct. 6, 1978) the Board found that a heating equipment service contractor was not deprived of status as a dependent contractor merely because he sometimes made use of a helper on his service calls. In that case the Board determined that the use of a helper merely to lighten the serviceman’s load was to be distinguished from the use of an employee hired on a regular basis to drive a second vehicle and make separate service calls, thereby substantially increasing the contractor’s capacity for profit.

When the Board is faced with the question of the effect of the use of paid help by a contractor it must determine whether, in the light of all of the evidence, the person or persons used merely assist the contractor in the performance of his work or in fact perform work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others.

In this case the Board is satisfied that the contractor-drivers who make use of a single helper, whether occasionally or regularly, do not cease to be dependent contractors by virtue of that fact. The use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking that can be meaningfully described as deriving profit in any substantial way from the work of others. The contractor-drivers examined used helpers when they were employed as milkmen and represented for collective bargaining purposes by the applicant prior to 1970. At that time the Board had recognized that the use of a helper did not of itself deprive an individual on his status as an employee under the Act. (*Automatic Fuels Limited*, [1966] OLRB Rep. Apr. 22).

12. In *E. M. Carpentry (1982) Limited* [1989] OLRB Rep Aug. 829 the Board found that a pieceworker with more than one employee is an employer and independent contractor. In that case the parties had agreed that pieceworkers, with only one employee, would be considered as “dependent contractors” and consequently their employee would be on the list in respect to the carpentry contractor. The Board in reaching its conclusion made the following comments:

16. With one exception, the pieceworkers covered in the Reports pay their helpers an hourly rate. The decision to pay an hourly rate, as opposed to a piecework rate, is made by the piece-

worker. In addition, the pieceworker decides what the hourly rate will be, when increases will be paid to the helpers and what the size of the increases will be. The Reports disclose that a pieceworker's helpers will be paid different hourly rates depending on the experience of the helper and his length of service with the pieceworker. It is the pieceworker who decides whether overtime will be paid, when overtime will be paid and at what rate. All matters relating to remuneration, such as vacation pay, the pay period etc. are determined by the pieceworker without any input from the carpentry contractor. With respect to a number of these monetary items, the evidence of the pieceworkers is that they made their decisions without regard to the collective agreement between E. M. and Local 27. Most of the pieceworkers were unable to say what payment was required by the Local 27 collective agreement.

17. Although the carpentry foreman supervises in a general sense the work of the crews, the pieceworker supervises the helpers. The pieceworker assigns work to the helper on a daily basis. If a carpentry foreman notices that a helper is not properly performing his work, he will advise the pieceworker of this situation if the pieceworker is present. The pieceworker determines the hours of work for the crew, when it will start and when it will finish for the day. The pieceworker decides whether the crew will work on any given day. Decisions regarding when vacations will be taken and whether a helper can have a day off are made by the pieceworker. The carpentry contractor does not determine these matters.

18. The pieceworker deducts the normal statutory deductions from a helper's pay. For instance, taxes are deducted and remitted. The pieceworker will pay W.C.B. premiums on behalf of his helpers. Some pieceworkers deduct dues from the helpers and remit them to Local 27, while other helpers of some pieceworkers pay their dues directly to Local 27. Most pieceworkers have a bookkeeper, do not advertise their business, although they might advertise for helpers, and do not have a business phone number. Pieceworkers file their tax returns as a business. In other words, they deduct from their income all their expenses, such as monies paid for helpers, fuel, depreciation, etc.

19. The only material the pieceworkers provide is nails. The other materials required for the carpentry work are supplied by either the builder or the carpentry contractor. With respect to equipment, the helpers provide their own hammer and pouch. The carpentry contractor may provide some of the more expensive tools, such as a riveting gun. Most of the tools used by the pieceworker and helpers, such as levels, saws etc. are owned by the pieceworker.

20. It does not appear from the material in the Reports that the carpentry contractor has any rules of conduct which apply to the pieceworker and his helpers. In one instance, a pieceworker was drinking on the job and indicated that E.M. could not prohibit him from doing this and did not have any rule prohibiting such conduct as far as he was aware. This same pieceworker did have rules governing the conduct of his helpers, one of which was that they could not drink during working hours.

21. The number and quality of the helpers has a significant impact on the profitability of the pieceworker's operation. Since the pieceworker is paid on a production basis, the more a pieceworker can produce in a given time frame, the more a pieceworker will make. The more experienced and skillful a helper, the more money the pieceworker can make off the helper. The more helpers used, the more production can be supplied by the pieceworker, and therefore the more he will make. A pieceworker with a number of helpers can have a crew working for E.M. and on that same day have two helpers working for someone else. In Report I, there is an example of a pieceworker who made less in 1987 even though the rates for that year were higher than in 1986 because he was able to find more helpers in 1986 and was able to produce more.

• • • •

33. In reviewing the evidence in the Reports concerning those pieceworkers with two or more helpers, *the Board is satisfied that these pieceworkers are engaged in an entrepreneurial activity of the sort which more closely resembles that of an independent contractor rather than that of an employee. The more helpers a pieceworker has, the greater the opportunity to increase his profitability. The pieceworker in this situation is clearly profiting from the labour of others and is very much the master of his own business.* To use the language in *Canada Crushed Stone*, the pieceworkers with two or more helpers are employers in substance as well as form. Their power to

hire, fire, discipline and to set the terms and conditions of employment of their helpers, even though the pieceworkers are economically dependent on a carpentry contractor, indicate that the pieceworkers with more than one helper more closely resemble an independent contractor and are entities which are not entitled to the benefits and protections of the Act. Accordingly, for the reasons set out above, the Board finds that a pieceworker with more than one helper working for E. M. or Westroyal is an employer and independent contractor and that these pieceworkers and their helpers are not employees falling within either the E.M. or Westroyal bargaining unit for purposes of the E.M. and Westroyal applications.

(emphasis added)

13. This panel is faced with a different factual underpinning than the facts found by the panel in *E.M Carpentry* (supra). However, the question which this panel must answer remains the same: By using a helper, have the partners of M. R. engaged in an entrepreneurial activity, such that they more closely resemble independent contractors rather than dependent contractors?

14. Antonio Carlos Bravin was assigned by the partners in M. R. Carpentry to perform the job of second trim carpentry, which included attaching the door hardware and placing the quarter round. He only worked when the partners were required to meet a deadline set by Alpa. He was paid by the house on a piecework basis. There were no employee deductions taken off the checks he received. He did not pay WCB premiums, and in fact was covered by the premium paid by Alpa. He received instructions from Larry Trottier, and also from the partners of M. R. Carpentry, however for the most part he worked as a skilled tradesperson and was not in need of much direction. On a percentage of work done basis, the partners of M. R. Carpentry passed through the amounts of money they received from Alpa to Bravin without making a profit from his labour. There is no conclusive evidence about who had the power to discipline or set working conditions. M. R. Carpentry was concerned with efficiency and deadline issues rather than a desire to profit off of their "helper". When deadlines for houses completed were pushed back and the partners were not under "deadline" stress, they performed the tasks of the second trim themselves. The Board finds that, employment of a helper in these circumstances was directly related to Alpa's deadline requirements.

15. Under these circumstances, the partners of M. R. Carpentry were no less dependent on Alpa than if they did not have a helper. In effect, Alpa by controlling the deadlines, and the amount of houses to be trimmed also controlled the decision about whether or not M. R. Carpentry needed a helper. Consequently for the purposes of the Act, Alpa is the employer of Ricardo Ferreira, Mauricio Santos, and Antonio Carlos Bravin.

16. Having settled the description of the appropriate bargaining unit (see the decision of October 3, 1991, of a differently constituted panel of the Board) and finding that for the purposes of the Act Richard Ferreira, Mauricio Santos, Antonio Carlos Bravin and Fiore Desantis are employees of Alpha and are properly on the list, the Board is satisfied on the basis of all evidence before it that more than fifty-five per cent of the employees of Alpa Wood Mouldings Company, a division of Alpa Lumber Inc. in the bargaining unit, at the time the application was made, were members of the applicant on December 27, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

17. Section 146(2) of the Act, provides for the issuance of more than one certificate if the applicant has a requisite membership support:

... the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial

and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 146(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 1 above in respect of all carpenters and carpenters' apprentices in the employ of Alpa Wood Mouldings Company, a division of Alpa Lumber Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

18. Further, pursuant to section 146(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of Alpa Wood Mouldings Company, a division of Alpa Lumber Inc., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1499-90-R; 1500-90-R; 1512-90-R International Union of Operating Engineers, Local 793, Applicant v. **Camaro Enterprises Limited**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Petitioner's own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the petitioning activities to the employer - Board according no weight to petition - Certificate issuing

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *D. G. Wozniak* and *D. A. Patterson*.

APPEARANCES: *S. B. D. Wahl* and *E. Kaplanis* for the applicant; *William S. Gardner* and *Barry Mulder* for the respondent; *Michael Werier* and *Len Miller* for the objectors.

DECISION OF THE BOARD; July 24, 1992

1. This is the continuation of consolidated applications for certification for a unit of construction operators and drivers of the agreed-upon employer Camaro Enterprises Limited in the District of Kenora. The applicant recently has been certified to represent the employees of Camaro in the areas of Thunder Bay and of Rainy River as well. The parties here went through protracted examination proceedings to settle the "List of Employees", culminating in a decision by another panel of the Board dated April 30, 1992. That decision determined that the applicant was in a position to be certified without a vote pursuant to the provisions of section 7(2) of the *Labour Relations Act*. There were, however, timely statements in opposition filed in this matter by both Mr. Len Miller and Mr. Frank Cooney, and the overlap with the applicant's membership evidence was such that if the Board were to be satisfied that either of the two documents represented a voluntary

“change of mind” on the part of the employees who signed them, the Board normally would exercise the discretion vested in it to order a vote.

2. The Board in the course of arriving at the decision just referred to also made the following determinations of “employee” status with respect to this application:

21. With respect to the applicant’s “managerial” challenges, the Board finds, on the evidence before it, that D. Boulanger, W. Peniuk and D. Oneschuk exercise managerial functions within the meaning of section 1(3)(b) of the Act and must therefore be deemed to not be employees for purposes of the Act in this application. The Board finds that L. Miller, E. Cotea [Coté] and D. Slavuta do not exercise managerial functions and are properly included on the list of employees for this application.

About Mr. Miller in particular the Board wrote:

25. L. Miller worked with a crew of three other employees. He was generally actively employed as a truck driver although on the date of application he spent the majority of his day operating a shoulder spreader. The evidence does not suggest that Miller could affect the employment of any employees of the respondent of [or] that he had any other managerial responsibilities.

3. The organizing campaign in question occurred during the summer of 1990, amongst employees of the respondent engaged in road-work on Highway 17 running westward from Dinorwic to Dryden. The only evidence presented by the “petitioners” was that of Len Miller. Mr. Miller testified that he read the “green sheets” that were posted by the Labour Board at the job site, and decided on his own to take up a petition in opposition to this application because he “doesn’t like Unions”. He testified that he did not discuss with anyone else what to put as a preamble to the petition, and that the words used came strictly out of his own head. The preamble to Mr. Miller’s petition read:

We the undersigned employee’s wish to oppose a Union of Camaro Enterprises Ltd. by the International Union of Operating Engineers Local 793.

Mr. Miller testified that he took his petition around by himself, always keeping it on his own person, and that he approached employees only on lunch or coffee breaks, or after working hours at the end of the day, and never in the view of members of supervision. A second petition filed with the Board, by Mr. Cooney, bears exactly the same preamble as Mr. Miller’s, except that it is type-written. Counsel for the petitioners advised the Board at the outset of the hearings that Mr. Cooney would not be attending to give evidence, and Mr. Miller was able to offer no explanation as to how his and Mr. Cooney’s petition came to bear the same preamble. Mr. Miller testified that he had not been aware at the time that anyone other than himself was circulating a petition, and that he learned of the existence of this second petition only after giving his testimony before the Labour Relations Officer, whereupon he and Mr. Cooney agreed along with some others to retain their present counsel.

4. Mr. Miller’s home is in the Winnipeg area, as is the respondent’s Head Office, and he has worked for the respondent during the construction season in each of the past 12 years. Mr. Miller is principally a truck driver, and in fact leases his own tractor-trailer to the respondent. It is clear from the evidence of everyone that what Mr. Miller did for the bulk of the job in question, commencing with his employment on it at the end of June, was to haul and dump gravel. Indeed, Ed Kaplanis, the applicant’s chief organizer for this application, was around the job from May to September, and acknowledged that all he ever saw Mr. Miller do was drive truck. Mr. Kaplanis a couple of times in fact tried to get Mr. Miller to sign a card for the Union. What is equally clear, however, is that Mr. Miller, by his own admission, has on occasion served the respondent in the capacity of a foreman - albeit, in Mr. Miller’s words, a “working” foreman - and towards the latter

part of the project was directed by the respondent's superintendent, Walter Ambrozik, to provide himself with a white construction hat and a company half-ton and take over supervision of the shoulder-spreader crew. While Mr. Ambrozik himself, for example, prefers to wear a baseball cap because, as he says, the hard hat gives him a headache, it is clear from both the *viva voce* evidence and the transcript of the LRO hearing, to which the parties referred us, that a white hat on this project was the typical *indiciu* of individuals placed by the company in at least the role of a "working" foreman - as is the use of a company half-ton. Mr. Miller's evidence is uncontradicted that even after he took over the half-ton, he carried tools in the back of it, and might help in manually spreading gravel, or setting the mould-board, as needed. However, it is also clear that, apart from employees like the sign-man or the mechanic whose job entails such mobility, no one but "foremen" were provided with a company half-ton to drive, and, as will be seen, the assignment of that truck allowed Mr. Miller the latitude to visit employees with his petition at points along the job removed from the place where the actual spreader crew was working.

5. The timing of Mr. Miller's move to "foreman" of the spreader crew was obviously of significance to the issue that the present panel of the Board had convened to hear, and Mr. Miller at the outset was most adamant in his cross-examination that the change did not take place before the month of October. That was the firm evidence of the superintendent, Mr. Ambrozik, as well. By the end of Mr. Miller's own cross-examination, however, Mr. Miller acknowledged that he had been given his hat and truck by the terminal date for this application, September 20th, and that he did in fact approach various individuals in his truck to sign the petition. For reasons that will be elaborated upon in the jurisprudence below, the parties recognized that the determination of the Board in its April 30, 1992 decision as to Mr. Miller's "actual" status is not determinative of the issue that the present panel has to decide. But we would note in any event that the date of the application itself, being the relevant date for the purpose of the LRO hearings and the Board's earlier status determination, was September 7th, a week to two weeks prior to the emergence of Mr. Miller's petition, and the "Foreman's Daily Report" tendered in those hearings made it clear that as of *that* date Mr. Miller was in fact, as he claimed, still hauling gravel in the large tractor-trailer.

6. This timing of the change in Mr. Miller's status was confirmed as well by a variety of employees called to testify before us on behalf of the applicant. Counsel both for the respondent and for the Interveners placed considerable weight in argument on the difficulty of the applicant's witnesses in recalling specific dates or sequences, or in testifying in a manner that conformed with the details of written statements that had been provided by them to the Union at the close of the applicant's organizing campaign. That was, however, in September of 1990. It is unfortunate that *any* case before the Board would take so long to be completed, let alone a certification application, but the fact is that delay of that sort is always going to have some effect on the ability of witnesses to give clear, cogent evidence. While the applicant's witnesses in giving their testimony generally had their prior written statements to be measured against, Mr. Miller did not. On the other hand, Mr. Miller did have his nearly-two-years-old petition to speak to, and were the Board not prepared to make allowances for the passage of time in assessing Mr. Miller's recollection of the origin and circulation of his petition, Mr. Miller might well have failed to meet the evidentiary onus upon him on the basis of the quality of his own evidence alone. With respect to the applicant's witnesses, Claudia Edmonson worked as a flagger, and testified that she was called to the other side of the road one day while flagging by Mr. Miller. Mr. Miller was stopped facing in the other direction in a half-ton truck which she had not seen him driving before. Asked by Ms. Edmonson about the truck, Mr. Miller responded that he was "a foreman now", and asked Ms. Edmonson if she would sign his petition against the Union. Mr. Oneschuk, her own foreman, was with the operating crew immediately across the road at the time. It might be noted that Ms. Edmonson's evidence of her perception of Mr. Miller as a result of this conversation with Mr. Miller and of his new truck and hat is consistent with the written statement she gave to the Union at the time, and with the evi-

dence given by her before the Labour Relations Officer. We also note that, while an issue was raised before us in Ms. Edmonson's cross-examination of her relationship with the foreman Dave Oneschuk, her account of the course and state of that relationship was not contradicted, and we note as well that she herself identified having a "problem" with the foreman in her own written statement given at the time.

7. Dennis Cornelius was employed as a grader-operator, and testified that, while the vehicles were warming up early one morning in September, he also noticed Mr. Miller for the first time with his own half-ton. As with Ms. Edmonson, Mr. Miller explained to Mr. Cornelius that he was a foreman now. Subsequently, again like Ms. Edmonson, Mr. Miller pulled up alongside Mr. Cornelius on the road, and asked him to stop his grader. Mr. Cornelius did so, and Mr. Miller asked him if he wanted to sign his petition against the Union. Mr. Oneschuk once again was on the side of the road opposite, and Mr. Cornelius pointed to him and replied to Mr. Miller: "With assholes like that around, we *need* a Union". A couple of hours later Mr. Cornelius was sitting having a coffee and Mr. Oneschuk walked by and said: "I hear you don't like me very much".

8. Sue Hatfield was employed as a surveyor and confirmed in her testimony that she had to consult with Mr. Miller as the spreader "foreman" from time to time in the later stages of the job, as to how certain things were going to be carried out, and that he himself told her that he had been promoted to foreman. Mr. Miller was driving his own half-ton and wearing a white hat at the time, and on one occasion pulled up as she was leaving lunch at the Truck Stop to ask her if she wanted to sign his petition.

9. The evidence of all of the employee witnesses who testified, except perhaps Ms. Edmonson, is that Mr. Miller was cordial in his approach to them on the petition, and said nothing to them at all to indicate any direct or indirect threat to their employment. Whether or not individual witnesses were or were not intimidated, however, or did or did not sign the petition, the Board recognizes that other employees may be reluctant to go to the Union or testify at all, and relies on episodal evidence like the above to gain an overall "objective" view of how, and by whom, such a petition has been handled, and what effect that might reasonably be inferred to have had with respect to the "voluntary" element that is critical to the Board in signifying this sudden "change of mind". As the Board put it early on in the *Morgan Adhesives* case, for example, [1975] OLRB Rep. Nov. 813, at 818:

There is a natural suspicion which attaches to a statement of desire following closely upon a union organization campaign. The Board must assure itself that the "change of heart" indicated by employees who sign the petition in opposition to the union after having indicated support for that same union is a free choice unimpeded by overt or subtle pressures. The rationale giving rise to this suspicion is well summarized in the *Pigott Motors (1961) Ltd.* case, 63 CLLC 16, para. 16,264, where the Board stated:

"... In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act...."

Or in *Lo Foods*, [1983] OLRB Rep. May 676:

14. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. Frequently, such

petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be so perceived. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer....

Thus the primary focus for the Board in "petition" cases, with the sole issue being the satisfaction of the Board as to voluntariness, is on employee *perception* - and on the courses of action of either the employer or the petition's sponsors, or both, to the extent they contribute positively or negatively in that regard. As *Westgate Nursing Home* put it, [1981] OLRB Rep. June 810, in the terms relevant here:

9. It appears from the evidence before us that Mrs. Haley does not in fact exercise managerial functions. However, in determining the voluntariness of a petition, the Board is concerned not with the actual authority or proximity to managerial authority of the person who circulates it, but rather with what employees reasonably perceived that person's authority or proximity to managerial authority to be. Thus, the Board will consider whether employees reasonably perceived the circulator as having managerial powers or as being in greater proximity to managerial authority than other employees (see, for example, *Fibre Therm Corp.*, [1980] OLRB Rep. Aug. 1196, and *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545). The Board has adopted this approach in recognition of the delicate and responsive nature of the employer-employee relationship which gives rise to a natural desire by employees to appear to identify with the interests and wishes of their employer. The Board must be satisfied on the balance of probabilities that the signatories of a petition signed it out of genuine opposition to the union and not out of concern that their failure to sign would be communicated to the employer, or could result in reprisals (see *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423, and *Radio Shack*, [1978] OLRB Rep. Nov. 1043.

That is not to say that every petition originated and circulated by someone in the kind of "hybrid" position of Mr. Miller will necessarily be rejected by the Board as unworthy of weight. The Board has recognized that a person whose powers are *not* such as to take them outside the scope of the Act are *prima facie* entitled to participate in the Act's activities, and as long as such persons are sensitive to their unique position, and neither seek to use it to advantage nor behave in a manner that would in any event be probable to produce that effect, the Board will not be adverse to according to that entitlement its due weight. See, for example *Elgin Handles Limited*, [1987] OLRB Rep. April 496; *Data Security Limited*, [1985] OLRB Rep. Aug. 1183; and *F. W. Woolworth Co. Limited*, [1982] OLRB Rep. May 797. The question in all cases is whether the conduct of the petitioner and/or the employer is such that the Board is of the view that the former, in carrying out his or her "anti-Union" petitioning activities, would reasonably be perceived as acting as the agent or conduit of the latter.

10. In the present case there are some troublesome aspects that have not yet been commented upon. On both pages 1 and 2 of Mr. Miller's 3-page petition there is the signature of a "managerial" person, and although Mr. Miller insisted that he, at least initially, showed each employee only the page he or she was being asked to sign on, the evidence of the employees who testified is uniformly to the contrary (and Ms. Edmonson makes that point in her original written statement, before it was apparent that there was going to be an issue over it). Ms. Hatfield, an articulate, impressive witness, also gave disturbing evidence about a conversation occurring early on with the office secretary. There was also evidence adduced by the applicant that would indicate overt involvement by the respondent, through Mr. Ambrozik, in the circulation of the petition itself. Given the quality of that latter evidence, however, and the low profile maintained by the respondent with respect to the Union's application in general, we decline to decide this matter on the basis of any direct or intentional involvement by the respondent whatever. Nor, in the end, do we find that we have to address the other issues raised in this paragraph. The timing of Mr. Miller's assumption of the "trappings" of management, together with what we are satisfied was his own

characterization of his new position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfy us that the employee perspective would more likely than not here have been to link Mr. Miller's petitioning activities to the employer. We accordingly do not find ourselves able to give any weight to the apparent "change of mind" by employees who previously had signed cards in support of the applicant, as represented by the petition put forward to us by Mr. Miller.

11. On the basis of the membership evidence filed by the applicant therefore, and pursuant to the provisions of section 7(2) of the *Labour Relations Act*, the Board certifies the applicant as exclusive bargaining agent for a unit of employees described as:

all employees of Camaro Enterprises Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing the same, and those employees of Camaro Enterprises Limited engaged as surveyors, construction labourers and truck drivers, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman.

12. A certificate will issue to the applicant.

3592-91-R; 4125-91-U Christian Labour Association of Canada, Applicant v. Mercedes Corporation c.o.b. as **Chateau Gardens Queens**, Respondent v. London and District Service Workers' Union, Local 220, Intervener; London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Complainant v. Christian Labour Association of Canada, Respondent

Certification - Hospital Labour Disputes Arbitration Act - Interest Arbitration - Pre-Hearing Vote - Timeliness - Interest arbitration award on "central issues" issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - "Local issues" arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after "central issues" award - Board directing that ballots cast in pre-hearing vote be counted

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members R. M. Sloan and D. A. Patterson.

APPEARANCES: Elizabeth Forster for the Christian Labour Association of Canada; Ron Gingrich for Mercedes Corporation; no one appearing on behalf of S.E.I.U., Local 220.

DECISION OF THE BOARD; August 4, 1992

I

1. This is an application for certification in which the Christian Labour Association of Canada ("CLAC") seeks to displace the London and District Service Workers' Union, Local 220

("SEIU") as the bargaining agent for a part-time unit of employees working at the Chateau Gardens Nursing Home in London, Ontario.

2. This certification application was made on February 6, 1992. CLAC requested that a "pre-hearing representation vote" be taken. By decision dated February 28, 1992 the Board determined that CLAC had the requisite appearance of membership support to warrant the taking of such vote.

3. The vote was taken on March 11, 1992. The voting constituency is set out in paragraph 5 of the Board's decision. It need not be repeated here. It suffices to say that the parties identified an issue concerning the "timeliness" of the application, and the Board directed that the ballot box be sealed and the ballots not counted until that matter was resolved.

4. CLAC takes the position that its application is timely. The SEIU maintains that it is not. Both union parties made brief written submissions with respect to the timeliness question.

5. On March 23, 1992 the SEIU filed an unfair labour practice complaint naming CLAC as respondent.

6. On April 7, 1992 the Registrar of the Board sent the parties a notice in Form 8 fixing April 29, 1992 as the date for a hearing before the Board to consider the timeliness question. Subsequently, the Board sent the parties a separate notice in Form 8, setting the unfair labour practice complaint down for hearing on the same date as the certification case. Since the matters were interrelated, it seemed sensible to set them down for hearing together.

7. By letter dated April 22, 1992 counsel for SEIU withdrew the unfair labour practice complaint. That left the certification matter pending before the Board, and to avoid any confusion, counsel for CLAC sent the parties, counsel for the SEIU, and the Board this Fax:

"Thank you for your letter of April 23, 1992. To avoid any confusion, I would be grateful if you would confirm that the hearing into the issues arising out of the application for certification in Board File 3592-91-R will be held as scheduled on April 29, 1992".

8. There is no written record of the Registrar's response to this Fax; but, in any event, there was nothing to derail the certification hearing fixed for April 29, 1992. The fact that the SEIU had filed, then later withdrawn, an unfair labour practice complaint, did not alter the hearing date fixed for the certification application - that is, the hearing to consider the SEIU'S challenge to the timeliness of CLAC's certification application.

9. In the ordinary course, the Registrar confirmed that the complaint that the SEIU had filed would not proceed. There was no revision or cancellation of the certification hearing, nor any reason to do so.

10. On April 29, 1992 CLAC, its counsel, and a representative of the respondent employer attended the hearing. The SEIU did not appear, and in accordance with its usual practice, the Board adjourned the matter, for a time, in case the SEIU or its counsel were simply late in arriving.

11. When the hearing reconvened, the Board was advised by CLAC's counsel that she had made enquiries and had determined that despite her letter of April 24, 1992, and the absence of any communication from the Registrar cancelling the hearing, the SEIU's representative was confused and would not be in attendance. There was no direct communication from the SEIU in that

regard, nor has there been any communication from the SEIU following the April 29, 1992 hearing. As of the time of writing, SEIU has made no submissions about “confusion” or otherwise.

12. In the circumstances the Board decided to proceed on April 29, 1992, despite the SEIU’s absence. This was a certification application, a representation vote had been taken, and all parties were anxious to ascertain whether the application was timely and, therefore, whether the ballots could be counted. There was no reason to adjourn the hearing and no direct request or explanation from the SEIU either that morning, or later.

II

13. The facts in this matter are not in dispute. The problem arises from the terms of the *Hospital Labour Disputes Arbitration Act* (“HLDAA”) and the application of those terms to the circumstances under review.

14. The provisions of the HLDAA to which reference will be made are as follows:

8.-(1) Where there are matters in dispute between parties to be decided by more than one arbitration in accordance with this Act, the parties may agree in writing that the matters in dispute shall be decided by one board of arbitration.

(2) For the purposes of section 6, the trade unions and councils of trade unions that are the bargaining agents for or on behalf of any hospital employees to whom this Act applies shall be one party and the employers of such employees shall be the other party.

(3) In an arbitration to which this section applies, the board may, in addition to the powers conferred upon a board of arbitration by this Act,

- (a) make a decision on matters of common dispute between all of the parties; and
- (b) refer matters of particular dispute to the parties concerned for further bargaining.

(4) Where matters of particular dispute are not resolved by further collective bargaining under clause (3)(b), the board shall decide the matters.

9.-(1) The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.

(2) The board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties.

(3) The *Arbitrations Act* does not apply to arbitrations under this Act.

10.-(1) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties agree on all the matters to be included in a collective agreement, they shall put them in writing and shall execute the document, and thereupon it constitutes a collective agreement under the *Labour Relations Act*.

(2) If the parties fail to put the terms of all the matters agreed upon by them in writing or if having put the terms of their agreement in writing either of them fails to execute the document within seven days after it was executed by the other of them, they shall be deemed not to have made a collective agreement, and the provisions of sections 3 and 4 or sections 6 and 9, as the case may be, shall apply.

(3) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties have agreed upon some matters to be included in the collective agreement and have notified the board in writing of the matters agreed upon, the decision of the board shall be confined to the matters not agreed upon by the parties and to such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(4) Where the parties have not notified the board of arbitration in writing that, during the bargaining under this Act or during the proceedings before the board of arbitration, they have agreed upon some matters to be included in the collective agreement, the board shall decide all matters in dispute and such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(5) Within five days of the date of the decision of the board of arbitration or such longer period as may be agreed upon in writing by the parties, the parties shall prepare and execute a document giving effect to the decision of the board and any agreement of the parties, and the document thereupon constitutes a collective agreement.

(6) If the parties fail to prepare and execute a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties within the period mentioned in subsection (5), the parties or either of them shall notify the chair of the board in writing forthwith, and the board shall prepare a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties and submit the document to the parties for execution.

(7) If the parties or either of them fail to execute the document prepared by the board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under the *Labour Relations Act*.

(8) Except in arbitrations under section 8, the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties.

(9) The date the board of arbitration gives its decision under section 8 upon matters of common dispute shall be deemed to be the effective date of the document that constitutes a collective agreement between the parties.

(10) Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties shall remain in force for a period of one year from the effective date of the document.

(11) Despite the provisions of subsection (10) and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years,

- (a) from the day upon which notice was given under section 14 of the *Labour Relations Act*; or
- (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 54 of the *Labour Relations Act*.

(12) Where under subsection (11), the period of two years has expired on or will expire within a period of less than ninety days from the date the board of arbitration gives its decision, the document that constitutes a collective agreement shall continue to operate for a period of ninety days from the date the board of arbitration gives its decision for the purposes of subsection 5(4), subsection 54(1) and subsection 58(2) of the *Labour Relations Act*.

• • • •

12.-(2) Despite section 62 of the *Labour Relations Act*, where notice has been given under section 54 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of

employees of a hospital to or by the employer of such employees and the Minister has appointed a conciliation officer, an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement or an application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit defined in the agreement shall not be made after the day upon which the agreement ceased to operate or the day upon which the Minister appointed a conciliation officer, whichever is later, except in accordance with section 5 or subsection 58(2) of the *Labour Relations Act*, as the case may be.

For comparison purposes, we also set out section 5(4) and 62(2) of the *Labour Relations Act*:

5.-(4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 62, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

* * *

62.-(2) Where notice has been given under section 54 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made.

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator;
- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he or she does not consider it desirable to appoint a conciliation board,

whichever is later.

15. Section 5(4) of the *Labour Relations Act* prescribes the so-called “open period” during which employees are permitted to terminate the bargaining rights of their current bargaining agent, or replace their existing union with a new one. Section 5(4) represents a balancing of the interests of employers, employees, and incumbent unions. Once a collective agreement is signed, there is a prescribed period of labour relations stability during which there can be no challenge to a union’s status as the employees’ bargaining agent. Such challenges can only be made during the last two months - the “open period” - of the collective agreement.

16. Pursuant to section 62(2), the “open period” can “remain open” beyond the expiry date of the collective agreement, unless a conciliation officer is appointed to assist the bargaining parties to conclude a new collective agreement. If that happens, the Legislature has determined that there should be no challenge to the union’s position during the conciliation process. If the parties conclude a collective agreement during conciliation, the “open period” then becomes the last two months of *that* collective agreement. Accordingly, unhappy employees are guaranteed at least two months to challenge their existing union, and that period may be extended depending upon the timing and results of conciliation.

17. This formula is relatively straightforward. It depends upon being able to ascertain when

the “open period” will be, but under the *Labour Relations Act* scheme, that is not particularly difficult. An employee or a raiding union need only look at the terms of the existing collective agreement. Such collective agreement *must* be in writing and must have a “specific” term - that is, a term of operation which is fixed and readily ascertainable from the document itself (see sections 1(1) and 54(1) of the Act). An interested person need only look at the duration clause, note the stipulated expiry date, and count back two months.

18. For employees governed by the HLDAA, the process is not so simple. Because of the process of interest arbitration to which they must resort, they may find themselves without a collective agreement for extensive periods of time, and pursuant to the HLDAA, they cannot challenge their union during the arbitration process. Thus, to the extent that the exercise of their *statutory right* to change unions is linked to the term of operation of a collective agreement, and an ascertainable “open period”, it may be very difficult to determine just when that “open period” will be. Their situation is further complicated by the likelihood that any agreement resulting from arbitration will be made “retroactive”, and the arbitration award may issue only a few months before - or even after - the nominal expiry date of the collective agreement in question. In the result, the simple formula of “open periods” envisaged by section 5(4) of the *Labour Relations Act* does not work very well in the hospital sector and employees are driven to the provisions of the HLDAA - which are not a model of clarity.

III - The Facts

19. It will be convenient to set out the facts in chronological order. As we have already mentioned, those facts are quite simple. What is difficult is the application of the HLDAA to them.

* * *

20. The last formal collective agreement between Chateau Gardens and the S.E.I.U. (“the 1986-88 agreement”) was *signed in September 1987*, and had a *term of operation from April 1, 1986 until March 31, 1988*. In other words, the process by which the 1986-88 collective agreement was ultimately consummated, was not concluded until sixteen months after the agreement nominally began to operate, or about six months before this two-year agreement was scheduled to expire. That kind of delay is characteristic of HLDAA processes and the relationship of these parties. The collective agreement was hardly settled before the parties would be required to negotiate a new one.

21. The negotiations to conclude a new collective agreement (“the 1988-90 agreement”) were not successful either. The matters in dispute were referred to arbitration before an arbitration board chaired by Prof. Michael Bendel. The Bendel panel was constituted pursuant to section 8 of the HLDAA. It had before it the submissions of eleven “hospitals”, including Chateau Gardens, and heard submissions on both “common” and “local” issues.

22. There was no dispute before the Bendel arbitration board about the term of the proposed collective agreement. The parties were agreed that the 1986-88 agreement should be replaced by a new two-year agreement running from April 1, 1988 to March 31, 1990. But there was much else in dispute, and the Bendel award did not issue until April 19, 1989, more than a year after the collective agreement to which it referred was to start. The Bendel award was not actually finalized until February 2, 1990, with a majority decision refusing to reconsider its award of April 19, 1989.

23. The Bendel award was never incorporated into a formal collective agreement. The par-

ties merely implemented its terms, then went on to the next round of arbitration, for as Prof. Bendel noted in his award that there has been little bargaining between these parties. Their last three disputes had been resolved by arbitration. For these parties, arbitration has been a pervasive and almost continuous process.

24. One result of this is that there was no formal collective agreement put in place for the period April 1, 1988 - March 31, 1990. Another is that employees wishing to exercise their statutory right to change bargaining agents will have some difficulty determining just when they are legally permitted to do so. What the parties have in mind is simple enough: sequential two-year agreements. The problem is the protracted arbitration process by which the precise contents of those agreements is determined.

25. The next arbitration board (for the 1990-1992 agreement) was also constituted pursuant to section 8 of the HLDAA. It was chaired by Gerald Charney, Q.C. As before, there were submissions from eleven employers and the parties anticipated a two-year term from April 1, 1990 to March 31, 1992.

26. Hearings before the Charney Board took place in January, April, May and June 1991. The Board heard the parties' submissions on a large number of "central" and "local" issues - that is, issues common to the eleven employer participants, as well as issues particular to specific nursing homes. This process was consistent with the parties' past practice and section 8(3) and 8(4) of the HLDAA. The Charney panel described the "background" this way:

The union who has bargaining rights for the above eleven nursing homes had applied for individual arbitration for each home. In the past the homes had bargained jointly. I was appointed the arbitrator under the Hospital Labour Disputes Arbitrations Act, for all eleven nursing homes and even though these matters were separate, I asked all the parties to meet with the Board, which was the same in each of the eleven homes, to discuss procedure.

As a result, the parties, that is, the eleven nursing homes and the union, both agreed that they would bargain jointly. There would be separate submissions on behalf of each nursing home for local issues as there had been in the past.

27. On December 16, 1991 the Charney panel issued what it described as a "preliminary award", settling certain common items in dispute. The award provided:

Consistent with the legislation, all matters herein are effective on the date of the award [December 16, 1991] unless otherwise provided.

28. Among the common items resolved in the preliminary award, was the "term of collective agreement" which (reflecting the parties' agreement) was to be from April 1, 1990 to March 31, 1992. As before, what is contemplated is a two-year arrangement, to replace the one which went before.

29. However, the complete contents of that collective agreement were not yet fully determined and are still not settled because the so-called "local issues" are still outstanding. The award of December 16, 1991 only settles the common terms of a collective agreement which - nominally at least - would expire in about three and a half months, on March 31, 1992. Those are the most important items in dispute, but they are not the only ones.

30. In planning its campaign to replace the SEIU, CLAC was guided by what it took to be the effect of the Charney award: the creation of the 1990-1992 collective agreement that would expire on March 31, 1992, thereby making the "open period" (the last two months) - February and March 1992. CLAC enrolled into membership more than 90% of the part-time employees cur-

rently represented by the SEIU, and filed its application on February 6, 1992. This is clearly within the nominal "open period", if the Charney award provides the correct benchmark.

31. CLAC reasoned that bargaining and arbitration have produced two-year protocols with the most recent one ending on March 31, 1992. The Charney award merely follows the previous pattern, and incorporates the parties' agreement. The award specifies that the collective agreement it is dealing with, will have a term of operation: April 1, 1990 - March 31, 1992. On that theory, this certification application is timely, and the Board can proceed to count the ballots to see which union the employees want to represent them.

32. But, unfortunately, it may not be as simple as that. At the time this application was made (and as late as the date of the hearing), the Charney panel had not issued its award settling the local issues. Thus, at the time CLAC's certification application was made, arbitration was ongoing, there was no collective agreement in effect, and there could be no collective agreement until the outstanding local issues were resolved. In fact, there had been no collective agreement (as opposed to arbitration awards) for some time - arguably since the last signed document between Chateau Gardens and the SEIU expired on March 31, 1988.

33. It is not clear how the HLDAA provisions apply to this situation, save to note that there is no formal "collective agreement" from which one can calculate an "open period" under section 5(4) of the *Labour Relations Act*, and the thrust of the HLDAA scheme is that there cannot be a challenge to an incumbent union during the process of arbitration. If an actual collective agreement is required for an "open period" to exist, then this application may be premature.

IV

34. While the problem posed by this case has the flavour of a Times crossword puzzle, in our opinion, the key to its solution lies in section 10(9) of the HLDAA, when read together with the purpose of the "open period", and the various HLDAA provisions dealing with the "term of operation" of the collective agreement.

35. As we have already mentioned, the "term of operation" prescribes not only the duration of a particular benefit stream, and the parties' bargaining cycle, but also the "open period" during which employees can change bargaining agents. In order to decide what the term of operation is, section 10(9)-(12) must be read together, and in that regard we might note that section 10(12) refers specifically to section 5(4) of the *Labour Relations Act* - the section which specifies when a raiding union can apply to displace its rival.

36. Since we want this decision to be understood by the employees affected by it, we will work through the relevant provisions of HLDAA, one by one.

37. First of all, we think it is significant that under section 10(9), it is the date upon which the arbitrator settles the common issues, that is deemed to be the "effective date" of any document that constitutes a collective agreement. That is the date when any eventual collective agreement comes into existence. It is from that date that subsequent HLDAA provisions mark time.

38. Subsection 10 provides that the collective agreement remains in force for a period of one year from the effective date [the "common issue" decision date - here December 16, 1991]. However, subsection 11 can override subsection 10, providing that the agreement will cease to operate two years after the expiry of the old collective agreement. Stopping there, the formula is: the agreement operates for one year after the date of the arbitration award [December 16, 1991], but no longer than two years from the expiry of the old agreement.

39. Subsection (12) adds an additional variable: if the award is issued beyond two years from the expiry of the old agreement, the collective agreement is extended for a period of ninety days for the express purpose of creating an ascertainable “open period”. In effect, the statute breathes artificial life into an expired agreement for the purpose of giving employees an opportunity to challenge or change their bargaining agent.

40. This formula is a little bit complicated but, in each case, it turns upon an ascertainable benchmark which can be readily ascertained by disaffected employees and rival unions. One need only know two things: the expiry date of the old agreement which will be apparent from its terms, and the date of the common issue arbitration award which will likewise be apparent on its face.

41. This scheme does not depend upon whether or when the local issues are resolved at arbitration. Those matters can either be decided by the arbitrator immediately, or s/he can refer them to the parties for further bargaining. But any delays associated with the resolution of local issues will not interfere with the “effective date” from which the collective agreement operates, and thus the term of operation of the agreement. And, if the term of operation is fixed with reference to ascertainable facts and statutory parameters, one will be able to calculate the “open period”. Finally, in this scheme, employees will have an opportunity to review the basic benefits secured by their bargaining agent before being asked to vote for a rival (assuming that employees might blame their union for the results of arbitration - an unwarranted conclusion, but not an unlikely scenario).

V

42. What then is the result in the instant case?

43. The Charney central issues award was released on December 16, 1991. The “effective date of the document that constitutes a collective agreement between the parties” is therefore deemed to be December 16, 1991 [10(9) of the HLDAA].

44. Looking only at section 10(10) of the HLDAA, the parties’ collective agreement would remain in force for a period of one year from the effective date - that is, one year from December 16, 1991. Stopping here, then, the agreement would expire on December 16, 1992 and the last two months of the collective agreement’s operation would be mid-October to mid-December 1992.

45. But section 10(11) of the HLDAA overrides subsection (10). Subsection (11) provides that the collective agreement must cease to operate two years from the day upon which the previous collective agreement expired.

46. When did the previous collective agreement expire? The better view is: March 31, 1990, the expiry date prescribed in the Bendel award, the date which the parties had agreed to (thereby maintaining their pattern of two-year protocols) and, quite apart from that, the date which one arrives at applying to the Bendel award the same statutory analysis set out above. In either case, the document which constitutes a collective agreement would expire two years after the old agreement expired on March 31, 1988. It would therefore expire at the end of March 1990, just as the parties and Arbitrator Bendel anticipated.

47. If that is so, then the replacement agreement covering the next two years (1990-1992) and eventually based upon the Charney award would necessarily expire on March 31, 1992 - which, again, is precisely what arbitrator Charney prescribed in his award, what the parties agreed to, and which is what flows, as well, from the application of section 10(11) of the HLDAA.

48. This certification application is therefore timely because it was made during the two-month period preceding March 31, 1992.

49. In the alternative, if anything turns on the fact that the parties did not bother to formally transform the Bendel award into a collective agreement, subsection (12) comes into play and the result is the same. The Charney award of December 16, 1991 came down more than two years after the last formal collective agreement between these parties had expired (i.e. in 1988). If that is so, subsection (12) would create an artificial "open period" for ninety days from December 16, 1991, the date the Charney common issues award is released.

50. In our opinion, the arbitration decision contemplated by section 10(12) is the one determining the common issues, and thus the "effective date" of the agreement. That is the award which is significant for calculating the time periods prescribed by section 10(9)-(11) and it makes sense that section 10(12) refers to the same award: the one issued by Mr. Charney on December 16, 1991.

51. In summary, however one looks at the facts, this displacement application is timely unless we accord some significance to the fact that the parties have not yet formalized a collective agreement because some of the local issues have not been resolved.

52. We are not inclined to do so. It is clear that whenever the parties get around to finalizing their collective agreement, its term of operation must be that prescribed in the statute. And this application will be timely. It would be entirely artificial to say that the CLAC application is untimely just now, but it will become timely when the Charney local issues award is released and the parties get around to formalizing the resulting terms in a collective agreement. It would be inappropriate to withhold counting the ballots when in due course an agreement is consummated and it will necessarily make this certification application timely after all.

53. For the foregoing reasons, the Board directs that the ballot box be opened and the ballots counted. The right of the SEIU or CLAC to represent the employees in question will turn upon how the majority of those employees have cast their ballots. Whichever union wins can get on with the process of bargaining - because of course the 1990-1992 agreement has now "expired" too, even though all of its terms have yet to be settled.

1038-90-JD International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Complainants v. **Electrical Power Systems Construction Association**, Ontario Hydro, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Respondents

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that

trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an "international trade agreement", nor a "local agreement" binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Lear* and *J. Kurchak*.

APPEARANCES: *S.B.D. Wahl, J. Phair, S. Arsenault* and *W. Cox* for the complainants; *Alex Ahee, Neil Meikle* and *Mitch Griffiths* for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46; *Neal Sommer, Peter Watson* and *John Tomlinson* for Ontario Hydro.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR, AND BOARD MEMBER J. LEAR; August 28, 1992

1. This is a jurisdictional dispute complaint filed pursuant to section 93 [formerly section 91] of the *Labour Relations Act*. In this complaint the complainant ("Ironworkers") asserts that the respondent employer ("Ontario Hydro") has assigned particular work to the respondent union ("United Association" or "U.A.") rather than to the Ironworkers.

2. The hearing into the merits of this dispute over the assignment of particular work lasted twenty-five days and was spread over a period of time from January 8th, 1991 to February 27, 1992. At the conclusion of the evidence the Board directed each party to file with the Board and provide to the other parties written submissions as to the determinations which the Board ought to make having regard to the evidence presented by the parties. Further written submissions in reply to those submissions were also filed by the parties. As a result of the parties' extensive, thorough and complete written submissions it was unnecessary for the Board to hear the *viva voce* arguments of the parties. Accordingly, and with the consent of the parties the hearing of June 4th, 1992 scheduled for that purpose was adjourned by the Board.

Preliminary Matters

Referral to the Plan

3. Before we turn to our determination with respect to the merits of this jurisdictional dispute we will deal briefly with a number of preliminary matters. At the commencement of these proceedings the Board in a unanimous oral ruling dismissed a motion brought by the United Association pursuant to section 93(14) [formerly section 91(14)]. The United Association had asserted that we ought not to hear this complaint as the matter had been referred by the Ironworkers to The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("The Plan").

4. The oral reasons provided to the parties on February 27, 1991 were as follows:

The Board's jurisprudence is clear. Where the collective agreements of the two disputing unions clearly and unequivocally provide that jurisdictional disputes are to be referred to mutually accepted tribunals such as The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("The Plan") the Board will not inquire into a jurisdictional dispute complaint filed under section 91.

In our view the Ironworkers' collective agreement does not contain such clear and unequivocal

language. Rather the Ironworkers' collective agreement with EPSCA provides an option to the Ironworkers. The union may elect to refer its jurisdictional dispute with another union *either* to the Ontario Labour Relations Board or to The Plan. The Ironworkers' collective agreement does *not* preclude the Ironworkers from seeking an adjudication of a jurisdictional dispute from the Ontario Labour Relations Board.

In our view, however, notwithstanding the Ironworkers' right to elect to proceed before either The Plan or the Board, the provisions of the Ironworkers' collective agreement do not go so far as to permit the Ironworkers to refer a jurisdictional dispute to The Plan, then change its mind and refer the *same* jurisdictional dispute to the Board (either before, during or after final adjudication by The Plan). That would be blatant forum shopping which would not be beneficial to or further harmonious labour relations between contractors and trade unions. Nor would it further relationships amongst trade unions. Such forum shopping would also undermine the adjudicative functions of both the Board and The Plan.

The issue therefore is to determine whether the complainant has already referred the jurisdictional dispute which it filed with the Ontario Labour Relations Board on July 17th, 1990 to The Plan. The United Association says it has and points to the letter dated April 24th, 1990 from Jake West the General President of the Ironworkers to Ms. Loretta Powers the Acting Administrator of The Plan and subsequent correspondence to or from Ms. Powers together with the provisions of The Plan itself in support of this position.

The Ironworkers disagree. Counsel for the Ironworkers submits that the April 24th, 1990 correspondence from Jake West is no more than a request by the Ironworkers that Ms. Powers advise or remind Ontario Hydro of its obligations with respect to a "change in original assignment" under the Procedural Rules and Regulations of The Plan. Alternatively, counsel argues that at its highest the April 24th correspondence refers to the administrator a dispute relating to "a change in original assignment" and not the merits of a jurisdictional dispute between the two unions. Counsel asserts that there is a difference between the procedures for dealing with allegations of a change in original assignment under the Procedural Rules and Regulations of The plan, and the procedures for referring and adjudicating the merits of the jurisdictional dispute pursuant to The Plan.

We have determined that we need not decide which of the opposing views is correct. For purposes of this preliminary ruling we need not determine whether the April 24th correspondence (and the other correspondence marked as exhibits which relate to it) is a referral of the merits of the jurisdictional dispute for adjudication by The Plan *or* whether it is a referral of a "change of original assignment" dispute to The Plan, *or* whether it is simply a request that The Plan administrator remind Ontario Hydro of its obligations under The Plan.

What is clear from the evidence is that the April 24th correspondence and all the correspondence which surrounds it refers only to the unloading and fabrication of structural beams and plate.

That work is *not* included in the mark-up of Hydro dated March 5th, 1990, was *not* assigned to either union in Hydro's final assignment dated March 23, 1990, and is not included in the work in dispute placed before this Board in the jurisdictional dispute complaint filed July 17th, 1990.

Although the Ironworkers' original complaint makes reference to "fabrication", the parties subsequent agreement about the description of the work in dispute at the pre-hearing conference, and their further agreement before this panel about the elements of the work which remain in dispute indicate that the disputed work does *not* include the off-site fabrication of structural beams and plate or the unloading of that material. From the evidence before us we conclude that the "fabrication" referred to in the April 24th letter is the off-site fabrication of the structural beams and plate work used in the on-site fabrication and construction of the steel floor falsework deck and track runway. It is this latter fabrication and construction which is clearly in dispute before us. The off-site fabrication of the components used to construct the floor falsework and track runway does not form part of this complaint. This complaint is concerned with the on-site fabrication and construction of the steel floor falsework deck and track runway itself.

For all of these reasons we dismiss this preliminary motion. We find that we have jurisdiction to

deal with this complaint and that such jurisdiction is not ousted by the provisions of section 91(14). In the circumstances of this case we decline to exercise our discretion under section 91(13) and will proceed to deal with the merits of this complaint.

The Cooper-Connolly Agreement

5. On March 12th, 1991 we rendered a unanimous "bottom line" oral ruling in which we dismissed a motion brought by the Ironworkers that we not entertain evidence with respect to a portion of the work in dispute as such work was covered by an existing trade agreement between the Ironworkers and the United Association. The Ironworkers submitted that the trade agreement was dispositive of at least a part of the work referred to in this complaint. It was asserted that by reason of the particular language of the collective agreements between EPSCA and the Ironworkers and EPSCA and the United Association the trade agreement was binding upon all the parties to this dispute and had the effect that work *must* be assigned in accordance *only* with that trade agreement.

6. The oral ruling made on March 12th, 1991 was as follows:

It has been submitted that we should determine, as a preliminary matter, whether or not the Cooper-Connolly agreement is an agreement between international unions claiming the work.

The Cooper-Connolly agreement is a document signed in 1958 by certain representatives of each of the Ironworkers (Cliff Cooper) and the United Association (Joseph Connolly). It sets out an agreement reached by these representatives at that time with respect to the jurisdiction of each trade union over certain work. The parties are agreed that a portion of the work in dispute in these proceedings is work referred to in the Cooper-Connolly agreement.

The issue is important because Article 6.1 of each of the collective agreements which EPSCA has with the Ironworkers and the United Association states as follows:

The jurisdiction of the union shall be that jurisdiction established by *agreements between international unions claiming the work* or decisions of record recognized by the AFL-CIO for the various classifications and the character of work performed, having regard for the special requirements of thermal, nuclear or hydraulic generation and transmission and transformation construction.

(emphasis added)

The last portion of this article namely commencing with the words "having regard for the special requirements" is not found in the collective agreement between the U.A. and EPSCA.

Put simply, counsel for the Ironworkers asserts that the Cooper-Connolly agreement is an agreement between the two trade unions which covers at least a portion of the work. He submits that in view of the language of the collective agreements and the Board's decision in the *Electrical Power Systems Construction Association*, Board File 0521-89-JD, dated June 28th, 1990 unreported we should exercise our discretion and not entertain that portion of this jurisdictional dispute which refers to work covered by the Cooper-Connolly agreement because of the existence of this trade agreement. He argues that the agreement between the two international trade unions governs and is binding upon Hydro. Therefore work must be assigned in accordance with this existing trade agreement namely to the Ironworkers.

In our view the so-called Cooper-Connolly agreement was not a subsisting or existing "agreement between the international unions claiming the work" at the times relevant to the adjudication of this jurisdictional dispute - namely, either when the collective agreements between EPSCA and the Ironworkers and the U.A. were signed or when the disputed work was assigned or performed. We therefore dismiss this preliminary motion. We will continue to adjudicate upon the merits of this jurisdictional dispute in its entirety.

We wish to emphasize that our ruling with respect to the Cooper-Connolly agreement will not

impact upon the admissibility of the past practice evidence of the employer or the area practice evidence (once we've ruled upon the parameters of that evidence). That evidence will be admissible regardless of whether or not the work was performed in accordance with, pursuant to, or in contravention of the Cooper-Connolly agreement.

Our reasons will follow.

We now provide our reasons.

7. On or about December 10th of 1958 Mr. Joseph Connolly, at that time a general organizer for the United Association, and Mr. Cliff Cooper, a general organizer for the Ironworkers, signed an "Understanding" the preamble of which reads as follows:

The following understanding has been reached between international representatives and local representatives of the International Association of Bridge, Structural and Ornamental Ironworkers and the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada based upon the interim agreement between the two international unions dated October 8th, 1953.

This understanding covers the work specified based upon area practice.

The Understanding goes on to specify four areas which the parties agree as being the work of either the Ironworkers or the U.A. The understanding was also signed by certain local representatives of the two unions. It is generally referred to as the "Cooper-Connolly Agreement".

8. The signatories to the Understanding are no longer alive. There is however some suggestion in the evidence that the Understanding was prompted by certain problems the two trade unions had encountered at the Hearn Generating Station of Ontario Hydro.

9. We heard much evidence as to the authority of the two general organizers to enter into this Understanding, the ratification or not of the Understanding by the general presidents of each of the two trade unions, and the various steps which the U.A. took from the time of the signing of the Understanding to November 1981 and thereafter to show that it did not recognize the Understanding and otherwise disavowed the agreement. The thrust of this evidence was to underscore the position of the parties that since its signing the Ironworkers have consistently looked upon the Cooper-Connolly agreement as a legally binding agreement to be applied by both trades and the employer community which employs the trades. For its part on the other hand the U.A. has always taken the position that the agreement was entered into without authority by Mr. Connolly, has never been approved or accepted by either the U.A. executive or its general membership and that generally the U.A. has consistently denied that the Cooper-Connolly agreement is a valid trade agreement.

10. In light of our ultimate determination with respect to this issue we need not detail that evidence or the submissions of the parties concerning that evidence. Whatever may have been the case in 1958 when the understanding was first signed, or in the intervening 23 years until November 1981 is in our view and in the circumstances of this case purely academic to the issue placed before us. Whether Messrs. Cooper and Connolly had authority to reach an agreement which would be binding upon their respective international unions, or whether that agreement had to be ratified and adopted by either the general presidents or the general memberships of either trade union is not relevant in the circumstances of this case.

11. In our view the provisions of the collective agreements between EPSCA and the U.A. and EPSCA and the Ironworkers (Article 6.1) set out in our oral ruling require employers such as Ontario Hydro to consider those agreements between the international unions claiming the work

that are in existence at the time the work is assigned. To put the matter another way, an employer such as Ontario Hydro must consider current, subsisting agreements as to jurisdiction between the trades. It need not necessarily consider trade agreements which have expired or which have been revoked or trade agreements which for any number of other reasons are no longer valid or in effect at the time the work is assigned. We agree with the submissions of counsel for Ontario Hydro that to hold otherwise would preclude the advancement of relationships between the employers and the trade unions and the continuing relationship between the trade unions themselves.

12. The only issue which the parties put before us in the context of the preliminary motion brought by the Ironworkers was whether the Cooper-Connolly agreement was an "agreement between international unions claiming the work" within the meaning of Article 6.1 of the applicable collective agreements. In order to make that determination the relevant time is the time when the work was assigned. Accordingly, the only issue therefore was whether the Cooper-Connolly agreement was an agreement between the international unions at the time the work was assigned.

13. Before proceeding further we note parenthetically that when the status of the Cooper-Connolly agreement was raised as a preliminary matter the only issue raised revolved around its status as an "international" trade agreement. The parties did not then raise or address the status of the Cooper-Connolly agreement as a "local" agreement although the Ironworkers in their written submissions at the conclusion of the case did put forth that argument. (We will address that argument later in this section). The issues which the parties put before the Board in arguing the preliminary motion and the circumstances of this case do not require us to decide such issues as the applicability of "international" trade agreements which have not been enforced, applied or relied upon by "local" unions in any particular area, or the status of "international" trade agreements which are inconsistent with, or have been modified or varied by local area practice. Similarly, in the circumstances of this case there is no issue about the effect of an "international" trade agreement upon a local union which continues to apply, enforce or abide by such an agreement notwithstanding its abrogation or rejection by the parent international(s). The issue simply is the status of the Cooper-Connolly agreement as an "agreement between international unions claiming the work" at the time the work was assigned and for the purposes of interpreting the collective agreements applicable to the parties to this dispute.

14. On November 4th, 1981 Mr. Martin J. Ward who was then the General President of the United Association wrote to Mr. John Lyons the General President of the Ironworkers the following letter:

On December 10, 1958, General Organizers of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, entered into a Memorandum of Understanding governing the unloading and handling of piping materials and equipment in Ontario, Canada. The Memorandum of Understanding has generally been referred to as the Cooper-Connolly Agreement.

This Cooper-Connolly Agreement has never been recognized as an official document by the United Association because it has never been acted upon or signed by the General President of the United Association which, under our rules, is required.

During our recent Convention a resolution was introduced calling for the abrogation of the so-called Cooper-Connolly Agreement. The delegates at the Convention, after a full discussion, have directed me, as General President, to notify you and your International Union that the Cooper-Connolly Agreement is null and void and in the future will not be recognized by the United Association or its Canadian affiliates. From this date forward, any future jurisdictional questions will be resolved without regard to the Cooper-Connolly Agreement. The procedures and guidelines which have always governed the settlement of these disputes between our Inter-

national Unions in other parts of the United States and Canada will henceforth also control any questions concerning work jurisdiction which may arise in Canada.

In our view this letter is dispositive of the status of the Cooper-Connolly agreement at all times relevant to this complaint. As a result of the letter of November 4th, 1981 from Mr. Ward to Mr. Lyons the Cooper-Connolly agreement was not at the time the work was assigned an "agreement between the international unions claiming the work". Whatever its earlier status may have been, the November 4th, 1981, letter notified the Ironworkers, in writing, that the U.A. was repudiating the agreement.

15. In his submissions to the Board at the time we dealt with this as a preliminary matter, and again in his written submissions to the Board at the conclusion of the case counsel for the Ironworkers argued that one party to a trade agreement cannot unilaterally abrogate the agreement. As an agreement is based on mutual consideration, there must also be "mutuality of its rejection". He asserted that parties to a trade agreement must assume responsibility for the agreements made so that if problems arise under the agreement or because of the agreement *both* parties must agree that their original agreement with respect to work jurisdiction is no longer in effect. In the written submissions at the conclusion of the hearing in which a reconsideration of our oral ruling is urged the Ironworkers state:

Simply put, International Unions ought not to be able to unilaterally abrogate their commitments. (at page 39)

To allow unilateral abrogations simply encourages confusion and lack of stability with respect to trade jurisdiction in the construction industry. (at page 41)

16. It was submitted that if agreements could be unilaterally revoked by a party there would be no utility in reaching an agreement in the first place. Counsel for the Ironworkers argued that sound labour relations are fostered by enforcing agreements reached. They are not fostered if matters are in effect "left in the air" because a party can at any time decide that it no longer wants to live with the agreement it has made.

17. Counsel for Ontario Hydro submitted that the Board need not determine the status of the Cooper-Connolly agreement as the evidence before the Board established that Ontario Hydro has not consistently applied the agreement and has engaged in practices which are at variance with the Cooper-Connolly agreement. It was submitted that the evidence before the Board disclosed that none of the parties to this jurisdictional dispute complaint had "used" the Cooper-Connolly agreement in the past.

18. Both counsel for Ontario Hydro and the United Association submitted that the agreement was not binding because it had not been ratified by the general presidents of the two international unions. This is an argument which we need not address.

19. Finally, both counsel for the U.A. and Ontario Hydro asserted that an agreement between trades with respect to trade jurisdiction need not be an agreement in perpetuity. It does not bind forever and can be revoked. In this regard counsel for Hydro submitted that upon giving notice to the other party, a party to an agreement may resile from that agreement.

20. Counsel for the United Association adopted those submissions. He also noted that if this was not the case there would be no method by which a union such as the U.A. can undo results which, in this case, the U.A. asserts are the consequences of "conduct without authority". The

U.A.'s primary position continued to be that Mr. Connolly did not have the authority to enter into the understanding and/or bind the international union. As noted we need not address this argument.

21. We reject those submissions of Ontario Hydro which suggest that an employer can refuse to recognize and to apply valid and subsisting agreements as to trade jurisdiction between the trades claiming the work. In our view such conduct by an employer does not further harmonious labour relations between it and the trade unions representing its employees. Moreover, for the Board to condone the conduct of employers who seek to ignore valid and existing agreements with respect to trade jurisdiction also would not promote stability within the construction industry as a whole. An employer who determines to ignore an existing trade agreement concerning work jurisdiction does so at its peril. In this regard we simply note our concurrence with the past jurisprudence of the Board which finds subsisting trade agreements or arrangements as to work jurisdiction between international trade unions to be quite persuasive in circumstances where the agreement or arrangement has been recognized by both the internationals and their locals and the area practice has been generally consistent with the agreement or arrangement (see, for example, and most recently the decision of the Board in *Piggott Construction Ltd.*, [1992] OLRB Rep. June 748. We acknowledge that different considerations may apply where the international trade union parties to the trade agreement themselves have not sought to rely upon, apply or enforce their agreement or arrangements and/or the area practice of the local unions subsequent to the agreement has not been generally consistent with the trade agreement. That however is not the issue before us in this instance. The evidence does not support counsel for Hydro's assertion that none of the parties to this dispute had "used" the Cooper-Connolly agreement in the past either in assigning or claiming work.

22. In our view the matter does come down simply to the issue as to whether trade agreements are perpetual agreements or whether they can be revoked or repudiated by one party to the agreement.

23. We note at the outset that there is no reference to either a particular project or a period of time during which the Cooper-Connolly understanding was to operate. On its face the understanding or agreement is for an indefinite term. None of the parties referred the Board to any jurisprudence of either the Board or the Courts which considered the matter of the terminability of an indefinite term contract. We can only assume that this is because in the view of the parties an agreement or arrangement with respect to work jurisdiction as between trade unions cannot usefully be compared or contrasted to commercial contracts.

24. We agree that there are substantial and significant distinctions between commercial contracts and the type of agreements between trade unions such as the Cooper-Connolly agreement. Nonetheless, some analogies may perhaps be made.

25. At common law an indefinite term contract of employment may be terminated upon the giving of reasonable notice. The purpose of such notice is "... to give the employee or servant a fair chance to obtain a new position" (see Harris, David *Wrongful Dismissal*, Richard DeBoo publishers, 1990 edition at p. 1-2.) Conversely, an employee similarly provides notice of the termination of his or her employment contract to the employer to give the employer some time to find a new and suitable replacement. In both these instances the provision of reasonable notice puts the parties to the indefinite term contract in as close a position as possible to the circumstances as they existed before the agreement was entered into. What constitutes reasonable notice is dependent on the facts and circumstances of the case and includes a myriad of factors. (See, for example, *Bardal v. The Globe & Mail*, [1960] O.W.N. 253 (CJHC).

26. Similarly, in a number of commercial contract cases where the contract did not contain a provision for the termination of the contract the courts have held the contract to be terminable on reasonable notice. Inevitably these cases involved an agreement to supply goods or services over an unlimited period of time for a fixed, agreed upon payment. In due course the passage of years and inflation made the bargain grossly unequal as the cost of the goods or services escalated while at the same time the fixed payment became less in "real value" terms. The courts have permitted termination upon reasonable notice of such contracts by referring to the intent of the contracting parties and the notion that the circumstances which have developed were never within the intention of the parties so that the contract entered into cannot apply to the circumstances that have developed. By examining the terms of the contract and the circumstances the Courts may infer an intent by the parties to terminate the contract on reasonable notice.

27. In *British Movietonews Ltd. v. London & District Cinemas Ltd.* [1951] 2 E.R. 617 at 625, [1952] A.C. 166 at 186 Viscount Simon stated:

... If, on the other hand a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.

28. This concept has been accepted and endorsed in Canada. Thus, for example in *Boise Cascade Canada Limited v. the Queen in Right of Ontario et al* (1981) 34 O.R. (2nd) 18 the Ontario Court of Appeal at pp. 24-25 agreed with the concept. Although an appeal of this decision was upheld by the Supreme Court of Canada on other grounds, this aspect of the decision was not impugned by the Supreme Court (see *Town of Fort Frances v. Boise Cascade Limited et al* (1983) 143 D.L.R. (3rd) 193 at p. 208).

29. Conversely, the courts of Canada have *not* gone so far as to conclude that an agreement is terminable on some sort of reasonable notice merely because circumstances have changed since the contract was made. This concept was first advocated in the decision of Lord Denning in *Staffordshire Area Health Authority v. South Staffordshire Water Works Company* [1978] 3 E.R. 769 but was not supported by the majority of the English Court of Appeal in that case. The concept has been specifically rejected by the Canadian courts. Thus in the decision of the trial court in *Boise Cascade Canada Limited v. The Queen*, *supra* reported at 27 O.R. (2d) 216, at pp. 229-31 the trial judge held:

The court has no power to absolve a party from his contractual obligations simply because he finds them burdensome due to unforeseen circumstances nor can the court re-write the terms of a contract because it considers them no longer reasonable or because no reasonable person would now agree to them.

After quoting from the decision in *British Movietonews Ltd. v. London & District Cinemas Limited*, *supra*, the trial judge went on to state:

Part of the foregoing extract was quoted by Lord Denning, M.R., in his judgement in the *Staffordshire* case referred to by him as the forerunner of the modern rule of construction. It does not seem to me that the law has developed in Ontario to the point that parties to a contract can be relieved of an obligation or deprived of a benefit they could not have reasonably contemplated unless the contract can be construed to provide for such a result.

Upon appeal, the Court of Appeal concurred with these views of the trial judge. Similarly, the Supreme Court of Canada which heard an appeal of the decision of the Court of Appeal held:

The one issue which now appears to be accepted as settled by the parties to this appeal concerns

the right of either party to the agreement of 1905 to terminate it unilaterally by notice. Both courts below found no such right existed in law, and that issue was not argued at any length in this court, both parties conceding that it is difficult to contemplate the termination of an agreement where the terminating party cannot restore the other party to the position enjoyed prior to the execution of the agreement.

Town of Fort Frances v. Boise Cascade Canada Limited, *supra*, at p. 208.

30. We have reviewed these various legal principles only briefly in an attempt to glean some assistance from them in resolving this issue. If contract principles tell us to look to the intention of the parties was the intent of the contracting parties to the Cooper-Connolly agreement to make a perpetual, inviolate agreement? Are there grounds for inferring a power of termination in the Cooper-Connolly agreement or an intent by the parties that termination of the agreement was possible? Alternatively, should one trade union party to such a trade agreement or arrangement be permitted to unilaterally repudiate or terminate the agreement merely because, in its view, circumstances have changed? Did either party intend to enter into an agreement which could so easily be discarded? Unlike the cases of employment or commercial contracts, when dealing with an agreement, arrangement or understanding between trade unions with respect to their work jurisdiction these various questions are not separate, distinct or mutually exclusive. Rather they are tied together.

31. Assuming the trade agreement to be “valid”, that is to say entered into by persons authorized to do so, we do not think that a trade agreement or understanding about work jurisdiction can be terminated by either party immediately after it is made merely because a trade union party has changed its mind or suddenly views the circumstances differently. In the case of the Cooper-Connolly agreement that cannot have been intended by the parties at the time. Certainly immediate repudiation of that nature would not further stable and harmonious relationships within the construction industry. Formal, written trade agreements or arrangements may take months if not years of intensive negotiations between the trade unions as concessions are made, compromises are reached and the ultimate agreement is finalized, accepted and endorsed. As a result these written agreements must not be lightly set aside. Not only should the parties to the agreement be prohibited from lightly setting aside such an agreement, this Board similarly must be cautious in setting aside such trade agreements when asked to do so (see *Piggott Construction Ltd.*, *supra*.)

32. On the other hand, and again having some regard to the intention of contracting parties to a trade agreement there is the inherent improbability of any trade union entering into a trade agreement about work jurisdiction which operates to bind that union and its members in perpetuity. This is particularly so if such an agreement does not (as the Cooper-Connolly does not) contain a provision of any sort to deal with for example changed circumstances or new technology, or if the agreement does not contain procedures for re-negotiation or amendment should such factors require it.

33. The absence of any such provisions and the absence of any mechanisms for the resolution of matters not directly provided for in the understanding or agreement are factors to consider both in dealing with whether the agreement or understanding can be terminated, and if so in resolving upon what terms such termination should occur.

34. Undoubtedly it would be preferable if trade union parties resolved “in-house” any problems or disputes arising out of the interpretation or application of the trade agreement which they have negotiated. That was not done by Messrs. Cooper and Connolly. Similarly there is no evidence to suggest that in the intervening years between the signing of the Cooper-Connolly

agreement and the sending of General President Ward's 1981 letter the two trade unions sought to resolve the issue or dispute concerning the status or application of the Cooper-Connolly agreement. It may be that the absence of any such discussion was one of causes or motivating factors leading to the U.A.'s repudiation of the agreement.

35. On balance, although we concur with the submissions of counsel for the Ironworkers that an agreement or understanding concerning work jurisdiction should not be repudiated or abrogated lightly or "at a whim" (for to do so would cause instability and friction within the construction industry), we are of the view that at a minimum agreements which do not have a specific term of operation and which do not contain provisions or mechanisms for variation, negotiation etc. may be unilaterally terminated or repudiated upon the giving of reasonable notice. As with employment or commercial contracts, giving notice will enable the trade union parties (and others who may be affected by the repudiation of the trade agreement) sufficient time to arrange their affairs and otherwise get ready for the time when the trade agreement is no longer to be applied and honoured. More importantly the giving of notice will provide an opportunity for discussion.

36. In our view a significant difference between a commercial contract and an agreement about work jurisdiction lies in the observation of the Supreme Court that the party seeking to repudiate the agreement in the *Boise Cascade* case could not restore the other party to the position enjoyed prior to the execution of the agreement. That is not so for parties to a trade agreement.

37. Agreements or arrangements between trades are often based upon existing area practice. That is the case with the Cooper-Connolly agreement where the parties in the preamble specifically state that "this understanding covers the work specified based upon the area practice.". Unilateral repudiation of agreements or understandings with respect to work jurisdiction merely restores the parties to the position each enjoyed before execution of the agreement or arrangement. What has the non-repudiating party, in this case the Ironworkers lost as a result of the U.A.'s repudiation? In practical terms very little, if anything at all. At most, while the agreement was in effect the Ironworkers lost the opportunity to claim work which arguably it could have or would have claimed had the agreement not been entered into. In exchange however the U.A. for its part has presumably also lost an opportunity to claim work which arguably it could have or would have claimed had the agreement not been in effect.

38. Abrogation of the agreement or understanding may therefore have minimal practical effect. Abrogation of the agreement and restoration of the status quo as at the time the agreement was executed merely provides the parties with the opportunity to rely upon the past area practice as it existed at the time the agreement was executed together with the experience and/or area practice each has been able to develop while the trade agreement or understanding was in operation. Balanced against this minimal practical effect is the real likelihood that no trade union will enter into any agreement or arrangement concerning work jurisdiction if the effect of so doing is to bind that union and its members to the agreement forever. The necessary give and take to reach consensus is unlikely to occur if the giving and taking is to be carved in stone from that point forward.

39. For these reasons we are of the view that the interests of all the parties can be met by acknowledging that it is possible to unilaterally terminate indefinite term trade agreements or arrangements with respect to work jurisdiction upon the giving of reasonable notice. Once again however we wish to emphasize that discussion between the trades is to be preferred.

40. What constitutes reasonable notice must invariably be determined having regard to the particular facts of the case. These would undoubtedly include but are by no means limited to the subject matter of the agreement, the circumstances under which the agreement was made or sought to be terminated, the length of time during which the agreement has been operative etc.

We need not in this instance determine with any precision the length of reasonable notice. Indeed, we need not even determine whether that period of reasonable notice is to be measured in terms of months or years. Whatever period is "reasonable", we find that by March 1990 when the work was assigned and nearly eight and a half years after the written notice was delivered that period of reasonable notice had expired.

41. Although we need not determine the length of notice, we do wish to note that for purposes of certainty and to avoid confusion or misunderstanding notice should be given in writing. Further, notice of termination must be given by duly authorized representatives of the signatories to the agreement. That was the case in this instance where the international president of the U.A. gave written notice to the international president of the Ironworkers. In this regard the facts and circumstances of this case can be contrasted with those found in *Pigott Construction Ltd.*, *supra*, where a local union at various times sought simply to ignore an agreement entered into by its parent international and took no steps to bring its concerns to the attention of the international.

42. It was for these reasons that we found that at all times relevant to this jurisdictional dispute complaint the Cooper-Connolly agreement was not a trade "agreement between [the] international unions claiming the work" as referred to in the applicable collective agreements between EPSCA and the Ironworkers and the U.A.

43. In the final submissions to the Board the Ironworkers asserted that if the Cooper-Connolly agreement did not enjoy the status of an international trade agreement, it ought nevertheless to be given status as a "local agreement". Counsel referred to *Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775 at 786 paragraphs 26 and 27 where the Board commented upon the various types of agreements or understandings between unions and the degree of formality of such agreements. It was argued that the Cooper-Connolly agreement was also signed by the local business agent of Ironworkers Local 721 and the business manager of U.A. Local 46. It was asserted that:

There is absolutely no evidence that either Ironworkers, Local 721 or U.A. Local 46 has ever taken any action to abrogate "their" Cooper-Connolly agreement. At minimum then, within the ambit of the *Shaefer-Townsend Mechanical-Electrical Limited* case, the Cooper-Connolly agreement continues to bind Ironworkers, Local 721 and U.A. Local 46 as a local agreement or arrangement as to jurisdiction.

The reference to the decision of the Board in *Shaefer-Townsend* is a reference to the decision of the Board in Board File No. 2436-90-JD released February 4, 1992.

44. Counsel's characterization that there "is absolutely no evidence that ... U.A. Local 46 has ever taken any action to abrogate" the Cooper-Connolly agreement is inaccurate. The evidence clearly discloses that one of the moving forces, if not the prime initiator behind the abrogation of the Cooper-Connolly agreement was the membership and executive of Local 46. It was in large part the concerns of U.A. Local 46 which generated the resolution before the December 1981 U.A. Convention at which the abrogation of the Cooper-Connolly agreement was endorsed. At that Convention the U.A. Local 46 delegate urged acceptance of the resolution put forth by the Ontario Pipe Trades Council. There is no suggestion in any of the evidence before us that the U.A. Local 46 thereafter continued to apply and rely upon the trade agreement which was abrogated or repudiated by their international union. Indeed, the evidence is to the contrary. Since the letter of November 4, 1981, U.A. Local 46 has conducted itself as if the Cooper-Connolly agreement was not binding upon them. Although the situation may be different where a local continues to apply in its area a trade agreement repudiated by its parent international, on the evidence before us and also having regard to the broad but explicit language found in the November 4th, 1981 letter sent

by General President Ward "... to notify you and your international union that the Cooper-Connolly agreement is null and void and in the future will not be recognized by the United Association or its Canadian affiliates" (emphasis added) we find that even if the Cooper-Connolly agreement is construed to be a "local agreement", such local agreement has not survived and was not binding upon the two locals to this dispute at times relevant to this jurisdictional dispute complaint.

Parameters of Practice Evidence

45. Finally, we note that after hearing the representations of the parties and as a preliminary matter we orally ruled that evidence of employer past practice and area practice would be limited to projects within the electrical power systems sector of the construction industry as this was the sector in which the work in dispute had been performed. It is also the only sector in which the employer which assigned the work operates. We determined that work in other sectors was therefore not relevant to the adjudication of this complaint. We further determined that the only area practice evidence relevant to this complaint was the past practice evidence in Board area 8, the geographic area in which this dispute arose. Evidence of employer past practice province-wide was admitted. See *Commonwealth Construction Company*, [1991] OLRB Rep. June 742.

The Merits

46. As indicated the Board directed each party to file with the Board certain written submissions. It is useful to set out our oral direction to the parties at the conclusion of the evidence to outline the breadth of the submissions made:

In view of the number of witnesses and days of hearing in this matter the Board hereby directs each party to file with the Board and copy to the other parties on or before April 6th, 1992 a written account of the facts each party asserts the Board should find on the evidence. Such written account of the facts should include any assertions of the parties regarding the credibility of the witnesses. The written account must further include an identification by each of the parties of the issues each views as in dispute, the submissions of the parties with respect to the applicable jurisprudence and their submissions as to the relationship between the facts as asserted by the parties and those issues and the jurisprudence.

The Board further directs that each party file with the Board and copy to the other parties a written reply to the facts and submissions of the other parties on or before May 4th, 1992. Such reply does not necessarily have to include the recitation of any factual assertions made by the other parties which the replying party disputes. In its reply however the replying party should include the factual assertions the replying party views necessary in order to properly reply to the issues raised by the other parties, the applicable jurisprudence referred to by the other parties and the submissions of the other parties regarding the relationship between their asserted facts, the issues and the jurisprudence.

Thereafter the Board will convene a hearing to hear such oral representations as are necessary relating to the written submissions and replies that have been filed. The hearing is also to provide an opportunity to the parties to make submissions on matters or issues which may be raised by the Board.

47. By agreement, the parties extended the time limits for the written submissions. The Board did not object to that agreed upon extension. As stated the hearing scheduled for oral submissions was found to be superfluous given the parties extensive written submissions and was therefore adjourned with the consent of the parties.

48. We note that the Board is in a position to render this decision in a somewhat summary form but in a relatively expeditious manner (having regard to the length of the hearing and the

complexity of some of the evidence tendered) in large part because of the extensive written submissions of counsel.

49. As a result of the submissions filed, the Board does not find it necessary to detail in this decision either the evidence or the able and thorough submissions of counsel. We propose merely to make some general observations about the evidence and the credibility of the witnesses. In dealing with our decision and reasons for the decision in such a brief and condensed manner we do not mean to suggest that the Board did not consider all of the evidence tendered or all of the submissions made. Indeed, the Board reviewed all of the evidence in light of the factual assertions and submissions which the parties filed.

50. The submissions of the parties outlined and summarized all of the evidence of the witnesses. Our review of the evidence disclosed that generally these outlines and summaries, although not inaccurate, understandably tended to summarize, outline and highlight only those portions of the evidence which supported a particular position of the parties while ignoring or trivializing other parts of the evidence which did not support such a position. As a result the summaries are not always complete and therefore the conclusions which the parties asserted should be drawn are not necessarily correct.

51. With respect to the evidence we make the following general observations.

52. We found the evidence of Messrs. T. Williams and J. Sweeney to be particularly helpful and useful in determining the employer's past practice. Both of these witnesses have a lengthy and varied employment history with Ontario Hydro. Both provided their evidence in a clear, honest and forthright manner. Each had a good recollection of past events and circumstances. Generally therefore where their evidence conflicted with those of other witnesses the evidence of these two witnesses was preferred.

53. The evidence of the various other witnesses with respect to the past practice at Ontario Hydro has also been considered. Although the remainder of the witnesses were for the most part sincerely trying to give evidence about events that occurred some years ago, we found that these witnesses generally either had less ability to clearly recollect such events or were alternatively unable to succinctly and accurately describe the work which they did recollect performing. Some were unable to resist the influence of self-interest to tailor their evidence and thereby support "their" union's position.

54. With respect to the work in dispute and its actual performance we accept the evidence of Mr. A. Birney. We found Mr. Birney to be a reliable and honest witness. For example, Mr. Birney readily admitted in a forthright manner the discrepancies between what Ontario Hydro *intended* to assign to the respective trades as a result of the mark-up process, and the actual language used to describe that intention in the mark-up document. Thus, Mr. Birney acknowledged that he intended for the Ironworkers to perform the necessary "tailing" of the feedwater heaters at the timberline hoistway. The mark-up however assigns "rig material and equipment" to the U.A. This description can include, and for at least a part of the work was thought to include by the U.A. all of the "tailing" operations.

55. Our acceptance of Mr. Birney's evidence does not go so far as to include an acceptance that the mark-up process used by Ontario Hydro was proper or correct. Although we reject the submissions of counsel for the Ironworkers that "the entire mark-up process was a sham" (page 8) we are of the view that there were significant flaws in the mark-up process. Such flaws ultimately contributed to the dispute between the trades about the assignment of the work.

Description of the Work in Dispute

56. The description of the work in dispute as agreed upon by the parties and as described in the pre-hearing conference memo consisted of the following:

all work in connection with:

- (a) the fabrication and installation of structural steel floor falsework deck and track runway consisting of structural steel beams, channel iron, hollow structural steel shapes and plate; and
- (b) all rigging and signalling for power assisted hoisting by Operating Engineers;

in connection with the removal, rigging, transport and replacement of feed-water heaters at the Lakeview Thermal Generating Station of Ontario Hydro.

More particularly, and with reference to the description of the work in dispute as set out immediately above, the parties were agreed that the work can be described as follows:

- (a) with respect to removal:
 - (i) fabricate and install steel floor falsework, deck and track runway
 - (ii) rigging for all power assisted movement of feedwater heaters
 - (iii) operate hydraulic jacks.
- (b) with respect to reinstallation:
 - (i) signal and rig feedwater heaters for power assisted movement from timberline hoist to point of installation
 - (ii) operate hydraulic jacks
 - (iii) remove structural steel falsework, deck and track runway.

During the course of the hearing the parties agreed that certain aspects of the work included in the general description of "all rigging and signalling for power assisted hoisting" were no longer in dispute.

57. We find it useful to provide some further detail about the work in dispute.

58. The work in dispute was performed by Ontario Hydro's own forces as part of its construction project called the Lakeview T.G.S. Rehabilitation Project. Part of the rehabilitation project required the removal and reinstallation of eight feedwater heaters. The location of the eight feedwater heaters at the site is as follows. There are four (4) feedwater heaters in each of unit 5 and unit 6 at Lakeview T.G.S. In each of the units there are two feedwater heaters at elevation 304 and two feedwater heaters at elevation 329. Both these elevations are above ground level. At Lakeview T.G.S. ground level is described as elevation 254.

59. The feedwater heaters are cylindrical vessels approximately 25 feet high and 5 feet in diameter. Each is supported by two sets of legs. The “new” feedwater heaters were somewhat larger and heavier than the “old” feedwater heaters which were to be removed and replaced. Both the new and old feedwater heaters each weighed in excess of 20 ton.

60. The work associated with the removal of the “old” feedwater heaters and the reinstallation of the “new” feedwater heaters was generally performed in the same manner. The new feedwater heaters were installed in reverse order to the manner in which the old feedwater heaters were taken out. We will therefore generally detail only the work associated with the removal of the old feedwater heaters with references where appropriate to the differences between the removal of the old and the reinstallation of the new feedwater heaters.

61. As the new feedwater heaters were heavier, there was some structural reinforcement of the floors beneath the point of installation for the feedwater heaters. All of the structural reinforcement work was performed by the Ironworkers and is not in dispute.

62. Before proceeding further with the description of the work we note that we do not accept the assertions of the Ironworkers that “there is no evidence of a cogent distinction for the assignment of the installation of load-bearing structural steel floor falsework to members of the U.A. while acknowledging that load-bearing structural steel reinforcement of the floor at the point of installation was correctly assigned to Ironworkers”. In our view to draw an analogy between this reinforcement work and the construction of the floor falsework and track runway which is in dispute is incorrect.

63. We note that although eight feedwater heaters were removed and reinstalled, two different methods of completing this work were used. The four feedwater heaters in unit 5 and the two feedwater heaters at elevation 339 in unit 6 were removed and reinstalled using one method. This method involved the use of a track runway system and the hoisting of the feedwater heaters through the hoistway using a timberline hoist. The two feedwater heaters at the lower elevation (304) in unit 6 were removed and reinstalled in a different manner using a track runway system and a temporary platform placed on the turbine hall floor. These two feedwater heaters were landed on the platform and subsequently transported through the use of the turbine hall crane. We will deal with the six feedwater heaters which used the track runway system and hoistway first.

64. In order to remove the old feedwater heaters the feedwater heaters had to be precision cut and separated from the various piping systems to which they were connected. In addition the mechanical instrumentation was removed. Attachments were welded to the shell of the old feedwater heaters to facilitate their subsequent rigging and hoisting. As the new feedwater heaters came with trunnion pins attached, the welding of such attachments was unnecessary when the new feedwater heaters were installed. All work associated with the disconnection of the feedwater heaters was performed by the U.A. and is not in dispute. Similarly, reconnecting the various piping systems to the newly installed feedwater heaters was done by the U.A. and is not in dispute.

65. In order to move the feedwater heaters the distance between their point of installation and the hoistway through which they were lifted, a temporary tracking system was constructed. In addition, at least one turning platform was constructed at the top elevation in unit 6 where the feedwater heaters were required to be rotated 180 degrees. The construction of this tracking system or track runway and platform was assigned to the U.A. This work remains in dispute between the parties.

66. We accept as accurate the following description of the track runway system both as it

was originally planned and as it was subsequently installed. This description is taken from the submissions filed with the Ironworkers:

As planned, the structural steel floor falsework track runway was to be constructed of 3/4 inch plate laid over the pattern of building structural steel. Structural steel I-Beams were to be placed with either end on the 3/4 inch plate laid on the concrete floor. Each I-Beam would therefore be 3/4 inch above the concrete floor. The I-Beams were to be welded end to end in two parallel lines with bolted cross-ties of hollow structural shapes steel to provide lateral stability. Channel iron was to be stitch welded to the top flange of the I-Beam as a guide for the multi-rollers. The turning platforms were to be constructed of 3/4 inch plate laid on the concrete floor over the building structural steel. Structural steel I-Beams were to be placed flange to flange with either end on the 3/4 inch plate. These I-Beams would therefore be 3/4 inch above the concrete floor and were welded flange to flange. Above the top flange of the I-Beams was welded 1/2 inch plate.

As installed, the structural steel falsework track was re-routed. However, its general structure remained the same, cross-ties, giving lateral stability, were not bolted and were not made of hollow structural shaped steel but were made of ten inch I-Beams tack welded to the main ten inch I-Beams rails.

67. In respect of this description we note only that the welding referred to in this description was generally tack welding for alignment purposes only. It was not continuous welding for structural purposes. We note also that the track as re-routed did not follow the pattern of the building steel.

68. Mr. Birney testified that the track runway was "over engineered". As such there is some difference between the work in dispute as planned and as marked up by Ontario Hydro, and its actual performance on the site. The differences between the "as planned" and "as constructed" track runway system do not affect our ultimate determination with respect to the proper assignment of this work.

69. The track runway system was constructed before the feedwater heaters were moved. The track runway was temporary in nature being used only for the removal and reinstallation of the feedwater heaters. It was eventually removed by the U.A. The removal of the track runway remains in dispute.

70. The feedwater heaters were removed sequentially with those closest to the hoistway being removed first. Conversely, the new feedwater heaters were reinstalled in the reverse order to that in which they were taken out. Thus, those furthest from the hoistway were re-installed first. In this way the congestion and consequent problems of moving feedwater heaters around existing ones was avoided.

71. After the old feedwater heaters had been disconnected at their point of installation they were raised up by means of hydraulic jacks. Each feedwater heater was jacked up higher than the track runway installed immediately below it. After being raised the feedwater heaters were blocked up with wood. Multi-ton rollers were placed underneath the feedwater heaters. The feedwater heaters were rigged and placed on the multi-ton rollers on the track runway. This work was assigned to the U.A. and remains in dispute between the parties. Similarly, the jacking down of the new feedwater heaters onto the anchor bolts before their reconnection by the U.A. is also in dispute.

72. The feedwater heaters were moved horizontally along the track runway the distance between their point of installation and the hoistway. In order to move the feedwater heaters tuggers, come-alongs, chain falls etc. were used. Which of the various methods was used (either alone

or in some combination with the others) was dependent upon which method would be most effective and efficient. Thus for example tuggers were used for the long continuous "pulls" of the feedwater heaters at the upper elevation of unit 6. The lateral movement of these feedwater heaters was across the length of unit 5 and into unit 6.

73. As the distances for the lateral movement of the feedwater heaters varied there were no specific requirements in the plans as to when, where or under which circumstances tuggers were to be used. The use of tuggers as opposed to for example chain falls or come-alongs was left to be determined by the trade responsible for the lateral movement of the feedwater heaters which in this case was the U.A.

74. In our view the parties in their evidence and their submissions focused excessively on the use of tuggers and placed an inordinate amount of emphasis on this fact. The evidence disclosed that with the exception of the feedwater heaters at the upper elevation in unit 6 (where use of the tuggers accounted for approximately seventy to eighty per cent of the lateral movement) during the performance of the work in dispute there was minimal use of tuggers for the lateral movement of the feedwater heaters between their point of installation and the hoistway.

75. The lateral movement of the feedwater heaters on the multi-ton rollers travelling along the track runway and all signalling and rigging for that lateral movement was assigned to the U.A. This portion of the work remains in dispute between the parties.

76. None of the parties however dispute the assignment of the operation of the tuggers to the Operating Engineers. None of the parties claim the operation of the tuggers. Similarly there is no dispute that the tuggers were "set" (i.e. fixed to miscellaneous steel embedments in the concrete floor or affixed to building structural steel) by the Ironworkers. The installation of the tuggers by the Ironworkers is not in dispute.

77. The signalling and rigging for the operation of the tugger is an area of dispute between the two trades. In this regard we note that the evidence is far from clear with respect to the type of signalling used for the tugger operation. Mr. Birney's evidence suggests that in fact all signalling for the use of the tuggers during the lateral movement of the feedwater heaters was done by hand by the U.A. as the trade using the tuggers. He acknowledged however, and there does not appear to be any dispute between the parties that *if* radio signalling was required (i.e. because the operator's view was obstructed) that radio signalling was done by, and would be properly assigned to, the Ironworkers in accordance with Ontario Hydro's past practice. There is no dispute between the parties to this complaint that any radio signalling performed in connection with the performance of any of the work in dispute is properly the work of the Ironworkers.

78. Once the feedwater heaters were at the top of the hoistway they were "tailed". It was therefore necessary to lift the old feedwater heaters from their horizontal position to a vertical position. This was accomplished through the use of tuggers and/or chain falls used in conjunction with the timberline hoist by lifting the vessel at one end and restraining it at the other. In this way the load of the feedwater heaters was translated from the horizontal position on the multi-rollers at the hoistway to a vertical position hanging from the rigging beam in the hoistway.

79. Conversely, the new feedwater heaters arriving at the top of the hoistway were tailed from their vertical position in the hoistway to a horizontal position. At the top of the hoistway the new feedwater heaters were landed on the yoke of a multi-roller truck or "dolly". There was some difficulty landing the trunnion pins in the yoke because of clearance problems so that it was necessary to keep the new feedwater heaters elevated as they were rotated into their horizontal position.

80. The actual performance of the tailing operation at the top of the hoistway differed for the old and new feedwater heaters. With respect to the removal of the old feedwater heaters, five out of the six old feedwater heaters were tailed at the top of the hoistway by the U.A. The U.A. members signaled and rigged for this operation. For the removal of the old feedwater heaters, the Ironworkers tailed only one of the old feedwater heaters at the top of the hoistway.

81. On the other hand, the six new feedwater heaters being installed were all tailed at the top of the hoistway and landed in the yoke by the Ironworkers. The new feedwater heaters were left sitting on the yoke and were blocked up with wood by the Ironworkers. From there they were eventually lifted by the U.A. who removed the yoke, landed the feedwater heater on the track runway and transported it to the point of installation.

82. We note that the yoke for the new feedwater heaters was made of structural steel and fabricated by the Ironworkers. There is no dispute about the fabrication of this yoke.

83. All of the tailing operation at the top of the hoistway is in dispute between the parties. Each trade claims all of the rigging and signalling associated with all of the tailing of all the feedwater heaters at the top of the hoistway.

84. During the course of the proceedings the parties resolved those items originally in dispute between them which related to the rigging and signalling for the timberline hoist. Thus there is no dispute that there was substantial structural work required to alter the hoistway and install the timberline hoist. This work was performed by the Ironworkers and is not in dispute. Similarly, all of the signalling and rigging for use of the timberline hoist was done by the Ironworkers and is not in dispute. The signalling for the timberline hoist was done by radio and it is the undisputed and accepted past practice of Ontario Hydro to assign radio signalling for the timberline hoist to the Ironworkers.

85. At the bottom on the hoistway it was again necessary to "tail" the old feedwater heaters and move the vessels once again into a horizontal position. This tailing operation for the old feedwater heaters at the bottom of the hoistway was performed by the U.A. and remains in dispute between the parties. On the other hand the Ironworkers tailed the new feedwater heaters (from the horizontal to the vertical position) at the bottom of the hoistway. The performance of that work is also in dispute. Both trades claim all of the work associated with the tailing of the new and old feedwater heaters at the bottom of the hoistway.

86. After the old feedwater heaters had been tailed at the bottom, the feedwater heaters were "dropped" and all rigging was removed from the units. They were then re-rigged by the Ironworkers and were lifted and laterally moved from the bottom of the hoistway across the entire length of the turbine hall to the loading bay area using the turbine hall crane. This is a large bridge crane operated by Operating Engineers. At the loading bay the old feedwater heaters were lifted and transported onto flat bed trailers. The work associated with the re-installation of the new feedwater heaters was in the reverse order. All of the rigging and signalling work associated with the use of the turbine hall crane was performed by the Ironworkers and is no longer in dispute in this proceeding.

87. The removal and reinstallation of the two feedwater heaters at the lower elevation in unit 6 was performed by a different method. A temporary platform was placed on the turbine hall floor. Given the elevation at which these two feedwater heaters were located, and the configuration of piping surrounding the feedwater heaters it was possible through the selective removal of some of the pipes to "pick-up" the feedwater heaters from this temporary platform using the turbine hall crane.

88. In order to move the feedwater heaters the distance between the platform and their point of installation a temporary track runway system was constructed in a manner similar to that already detailed. That tracking system extended from the location of the feedwater heaters out to the platform. The construction of that tracking system remains in dispute between the parties.

89. These two feedwater heaters were disconnected and reconnected by the U.A. That work is not in dispute. The removal of pipe in order to permit the turbine hall crane access to the feedwater heaters was also done by the U.A. and is not in dispute.

90. The feedwater heaters were laterally transported along the track runway using multi-ton rollers and chain falls. That work is in dispute.

91. Once upon the platform the feedwater heaters were rigged to the turbine hall crane, lifted by that crane and transported over to the loading bay where they were loaded onto a flat bed trailer and removed from site. All signalling and rigging for the turbine hall crane was done by the Ironworkers and is not in dispute. There was no requirement to “tail” these two feedwater heaters at any point as they were laterally transported, lifted and placed on the flat bed trailer in a horizontal position.

The Decision - Fabrication and Installation of the Track Runway System

92. Having regard to all of the evidence and submissions of the parties we have determined that:

all work in connection with the fabrication and installation of structural steel floor falsework deck and track runway consisting of structural steel beams, channel iron, hollow structural steel shapes and plate

was improperly assigned to the U.A. That work should have been assigned to and performed by Ironworkers.

93. We note that we are not persuaded by the assertion of the U.A. that “the fabrication and installation of the deck and runway are analogous to the fabrication and installation of pipe supports since both exist for a purpose relating only to one trade”. That analogy, although possible is not convincing.

94. We find that the Board’s usual criteria of skills, training, safety, economy and efficiency, the existence of trade agreements or arrangements as to jurisdiction and the collective bargaining relationships are relatively equal as between the two trades. None of these enumerated criteria point in any particular fashion to the assignment of that work to either trade in preference to the other. We have placed no reliance upon the evidence or submissions of the parties with respect to the criteria of the constitutions of the trade unions.

95. The past jurisprudence of the Board has generally enumerated and examined each of these various criteria. A careful review of that jurisprudence however indicates that the primary focus of the Board in deciding a complaint concerning work jurisdiction is upon the employer and area past practice evidence. It is the rare and unusual jurisdictional dispute complaint in which the Board does not attach significant and primary weight to the area and employer past practice. Where appropriate these two criteria are measured and balanced together with the factors relating to economy efficiency and safety. The experience of the Board has shown that inevitably each of the disputing trade unions can point to some measure of skill or training and some language in either its collective agreement or constitution to support its claim. Generally, however and in the

absence of some prohibition which prohibits one trade from performing the work (for example a statutory enactment which precludes any person other than a qualified, certified member of a trade from performing the work) the enumerated criteria other than area and employer practice (together with safety and economy and efficiency where appropriate) will have little if any value when balanced against area and employer practice evidence. The real crux of most jurisdictional disputes revolves around these two past practice criteria. This complaint is no exception. In recognition of that fact the parties quite properly did not spend much time calling evidence or making representations about the other criteria. Each concentrated and focused upon the past practice evidence.

96. We find the employer and area past practice evidence with respect to the steel floor falsework and track runway to be inconsistent. Each trade can point to at least some specific examples where it has been responsible for the lateral movement of piping equipment to the point of installation using some sort of track runway system. On balance, however the Ironworkers' evidence concerning the construction and use of a track system disclosed a superior claim to that of the U.A.

97. The U.A. did tender evidence about the installation of some track runway systems similar to the track runway in dispute. Thus, we heard about the installation of the I-Beam used as a track runway on the roof of the reactor auxiliary bay at Pickering "A". We also heard evidence about a steel runway used in connection with the removal for repairs of the moderator heat exchangers at Darlington Nuclear Generating Station.

98. The greater majority of the U.A. evidence however indicated that when the U.A. was responsible for the lateral movement of its equipment, its more common practice was to merely set steel plate directly on top of the concrete floor as the equipment was moved along to the point of installation. This was referred to in the evidence as the "human chain" technique. Steel plate was placed on concrete, the equipment was rolled on and over it, and as movement of the equipment progressed the steel plate at the rear of the equipment was lifted and placed again in front of the equipment thereby forming a continuous chain of steel plate to the point of installation.

99. We do not equate this human chain technique with the construction of the track runway which forms the basis for this jurisdiction dispute complaint.

100. On balance and focusing particularly upon the nature of the work and the work functions associated with the fabrication and installation of the steel floor falsework and track runway we find that the past practice criteria favours an assignment of this work to the Ironworkers. As a result we award and direct that the work set out in paragraph 92 herein be assigned to the Ironworkers.

The Decision - Signalling and Rigging Work

101. With respect to this aspect of the work in dispute we find that none of the criteria of trade union constitution, claims to jurisdiction, collective bargaining agreements, skills, training, safety and efficiency is particularly persuasive or favour an assignment of one trade over the other. We have already addressed the criteria of trade agreements or arrangements as to jurisdiction in this decision. In the circumstances of this case that factor also does not affect the assignment of the work. Once again it is the employer and area past practice which is of primary importance in determining the assignment of the work in dispute.

102. With respect to the signalling and rigging work we find that the employer's own past practice is to assign to the Ironworkers the "handling" of piping equipment such as the feedwater heaters when power equipment is used. That "handling" necessarily includes all rigging and signal-

ling associated with the handling. The handling of piping equipment by the Ironworkers using power equipment however is only to the approximate point of installation. The interpretation given to the "approximate point of installation" has undoubtedly varied. That in itself is not surprising given the number and variety of pieces of equipment which have been moved over the years and the diverse locations to or from which that movement has taken place. Generally however that "approximate point of installation" can be related to the last use of power equipment. Once power equipment is no longer in use the U.A. has generally performed all handling (and all rigging and signalling associated with that handling) of the piping equipment up to and including its actual installation.

103. We find that the overwhelming practice is to view the use of the tugger as a tool of the trade. We do not agree with the suggestion that either the tugger or the hydraulic jacks used to lift and lower the feedwater heaters are "power equipment".

104. We further find that in the greater majority of cases, and after the completion of the last power lift, the U.A. tradesmen have been responsible for signalling and rigging for the lateral movement of piping equipment at the installation elevation. This responsibility for lateral movement involved the U.A. using any one of a tugger, manual chain fall, come-along, turfer, V-Dolly, pallet mover etc.

105. Therefore, on the basis of the past practice and employer practice evidence before us, and after consideration of the submissions of the parties, we declare and direct that the rigging and signalling in connection with the removal and replacement of the feedwater heaters at Lakeview T.G.S. is to be assigned as follows:

- (a) the raising and lowering of the feedwater heaters using hydraulic jacks at the point of installation is to the U.A.;
- (b) the rigging of the feedwater heaters for placement on the multi-ton rollers is to the U.A.;
- (c) the lateral transport of the feedwater heaters on the track runway system between the point of installation and the hoistway is to the U.A.;
- (d) the lateral transport of the feedwater heaters on the track runway system from their point of installation at the 304 elevation in unit 6 to the platform placed on the turbine hall floor is to the U.A.;
- (e) the top-of-the-hoistway tailing of the feedwater heaters which are to be removed and the signalling and rigging for same is to be performed by a composite crew of U.A. and Ironworkers. In this operation the Ironworkers shall handle and be responsible for the main hook of the timberline hoist;
- (f) the top-of-the-hoistway tailing and landing in the yoke of the new feedwater heaters to be installed is to the Ironworkers;
- (g) the signalling and rigging of the feedwater heaters for the timberline hoist is to the Ironworkers;

- (h) the bottom-of-the-hoistway tailing of all the feedwater heaters is to the Ironworkers;
- (i) the signalling and rigging for hoisting and lateral movement of the feedwater heaters using the turbine hall crane is to the Ironworkers; and
- (j) at the loading bay the signalling and rigging for the turbine hall crane to lift and laterally transport the feedwater heaters onto the flat bed trailers is to the Ironworkers.

DECISION OF BOARD MEMBER JOHN KURCHAK; August 28, 1992

1. I concur with the decision in all respects except wherein it deals with the Cooper-Connolly Agreement. Originally, as noted, I accepted the premise that Agreements between trades are not cast in stone and that this one was properly terminated. I believed that when the evidence showed that the General President of the United Association wrote to the General President of the Iron Workers Union, abrogating the Agreement, that it was a valid exercise. Going through the convention procedures as they had done seemed to make it all right and proper. However, after reading references to court cases, involving "common-law", "commercial law", and the "law of contracts", it struck me that perhaps it might be better to take a closer look at the issue strictly in the light of labour relations.

2. The rules that govern the workplace under the scheme of collective bargaining did not spring from contract rules - commercial law - or common law precedents, but rather developed in spite of them. The advent of collective bargaining set in motion its own set of rules and regulations to govern the process of industrial relations. Further, I have a fear that introducing court cases that are unrelated to labour issues brings in an element that could lead to further problems and complications in the future. Following the demise of the "Labour Court" set up under the 1943 Ontario Legislation, it was believed that lay practitioners could bring their own cases to the Board. It has not developed that way. The introduction of complicated unrelated court decisions increases the likelihood that Board procedures will be taken further out of the hands of those most directly affected by the issues brought before us. This is a trend which should be avoided.

3. The structures of the building trades organizations have a background and identity separate and far removed from commercial interests, whether they be related to an employer giving proper notice of termination in a non-union situation, or the rising costs in a commercial transaction.

Page 18 Trade Unions in Canada - Eugene Forsey.

"The first Toronto union was probably the United Amicable Trade and Benefit Society of Journeymen Bricklayers, Plasterers, and Masons, which, in 1831, demanded a 10-hour day: 5 am to 6 pm, with two hours off for meals. In December 1833 this body resolved that its members would work only for masters of the respective trades and only with other members of the society. Wages is left entirely to each employer."

4. We can see that the building tradesmen, from an early age, did not "do business" under any "laws of contract". A lot of hard work preceded the mantle of "legitimacy" that is enjoyed today. To quote further, from another source, with regard to common-law, we see some of the obstacles that had to be overcome.

5. Page 142 in the "Canadian Labour Economics" quoted from the Canadian Journal of Economic and Political Science Vol. XVII No. 1 - February 1951. (Stuart Jamieson).

"Governments in both countries up to the mid-1930's maintained a rather negative policy in industrial relations that operated on the whole to the disadvantage of organized labour. Employers in all but a few industries remained for the most part hostile to trade unions, and used a wide variety of tactics to prevent their employees from becoming organized. They enjoyed at the same time both superior bargaining power and a favourable legal status. Public regulation of industrial relations came almost entirely under the common law which, as interpreted and administered by the courts, placed severe restrictions upon organized labour."

6. It took over one hundred years for Labour to achieve recognition by law. "The Act of 1943 abolished the common law doctrines of conspiracy and restraint of trade as they applied to trade unions and gave employees the right to participate in union activities" (OLRB Annual Report 1981-82).

7. The building trade unions have a long history in the development of industrial relations with their counterparts in the construction industry. Agreements between the trades and Decisions of Records dating back to 1904 are listed in the "Plan for Settling Jurisdictional Disputes, nationally and locally". These decisions have an air of permanency, but provisions have been made for orderly change.

8. If Mr. Ward, General President of the United Association had taken a course of action in which he intended the General President of the Iron Workers to negotiate or re-evaluate the Cooper-Connolly Agreement it seems to me *that* would have made better labour relations sense. Building Trade Unions have had a long history of self-destruction through their jurisdictional battles. It is high time that they put their "Act" in order in the interest of good labour relations practice and self-preservation. Arbitrarily abrogating agreements is not the way to go. I would deny them that right.

0952-92-R Harc Incorporated, Applicant v. Ontario Public Service Employees Union, Respondent

Termination - Employer requesting that Board terminate bargaining rights on basis that union did not give notice to bargain within 60 days of certification - Board finding delay in giving notice not lengthy and that explanation given by union indicating inadvertence rather than intention to sleep on its rights - Employer suffering no prejudice from union's conduct - Application dismissed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *W. A. Correll* and *A. Hershkowitz*.

APPEARANCES: *S. Fraser* and *P. Melady* for the applicant; *Christopher Dassios* and *Ed Ogibowski* for the respondent

DECISION OF THE BOARD; August 6, 1992

1. This is an application under section 60 [formerly section 59] of the *Labour Relations Act* in which the applicant employer requested that the Board terminate the bargaining rights of the

respondent union on the basis that the latter did not give notice to bargain within sixty days following certification.

2. On the day set for the hearing of this matter, the Board invited the parties to stipulate the facts upon which they relied. The respondent union then indicated that it had been certified to represent employees on March 25, 1992. In early April, an internal control form was sent to the union's regional membership services department with the effect that a negotiator from the Guelph regional office was assigned to this bargaining unit. However, at that time the Guelph regional office was experiencing staffing difficulties, and as a result, indicated that it could not handle the matter.

3. The staff complement at the Guelph regional office was due to be increased by one. However, that person was not appointed until July of 1992. In the meantime, one of the other staff representatives contacted members of this bargaining unit and a bargaining committee was appointed. During this period, the employer had the name of a contact person on the forms that were filed during the certification process, but did not contact anyone from the union. On June 26, 1992, the employer brought this application to terminate the union's bargaining rights. On July 3, notice to bargain was served by the union. The applicant employer has declined to enter into negotiations pending the disposition of this application. Finally, counsel for the union indicated that he had with him a petition signed by sixteen out of twenty-three employees in the bargaining unit to the effect that this application should be dismissed.

4. The applicant employer stipulated that it had suffered prejudice as a result of the respondent union's delay in sending notice to bargain in the following manner. In February of 1992, a review team report was issued by the Ministry of Community and Social Services. One of the recommendations in this report was that the employer review its personal policies and consult with staff in this regard. Since that time, the employer has been in direct communication with employees in the bargaining unit about their preferences, and the result has been that a number of policies and structures have been developed that deal with issues normally addressed in collective bargaining, including the distribution of work, and policies that confer benefits on employees. Other policies are planned. The day after this application was filed, the employer implemented those policies. Among other things, the employer was concerned that the union might file an unfair labour practice complaint.

5. Both counsel indicated that they were not in a position to dispute the facts stipulated by the other with the exception that counsel for the employer contended that any petition that was not filed in a timely manner in this application was now irrelevant. In addition, during argument it appeared that he took issue with the assertion that the union had appointed a bargaining committee.

6. The Board then heard the submissions of counsel. In this regard, counsel referred to *Medi-Park Lodges Inc.*, [1979] OLRB Rep. Oct. 1007, *Yarntex Perth, Division of Yarntex Corporation Limited*, [1975] OLRB Rep. Feb. 137, *Bois A. Lechance Lumber Limited*, [1984] OLRB Rep. Jan. 1, *United Counties of Stormont, Dundas and Glengarry*, [1979] OLRB Rep. April 354, *Trizec Equities Limited*, [1978] OLRB Rep. Feb. 189, *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670.

7. The Board subsequently gave the following oral decision:

Having carefully considered the parties' submissions and those of the facts relied upon by the parties which are undisputed, we conclude on the basis of the Board's jurisprudence that the application should be dismissed. The amount of delay involved here is not lengthy, the explana-

tion advanced by the respondent indicates inadvertence rather than an intention to sleep on its rights, and we are not persuaded that any prejudice suffered by the employer results from the respondent's conduct.

2893-91-R Labourers' International Union of North America, Applicant v. Hurley Corporation, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. H. Wightman* and *D. A. Patterson*.

DECISION OF THE BOARD; August 4, 1992

1. This is an application for certification.
2. In an earlier decision, dated May 13, 1992, the Board directed that a certificate issue forthwith to the applicant. That decision also considered the motion for non-suit brought by the union, with respect to the voluntariness of the petition. In that respect, the Board wrote, in part, as follows:
 9. Over five further hearing days, the Board heard the evidence of the employee objectors with respect to the voluntariness of the petition they had filed. At the conclusion of their evidence, the employer indicated it had no evidence to call, at that stage, on the issue of the voluntariness of the petition. At that point, the applicant union in effect made a motion for a non-suit, arguing that the petitioners, based on all their evidence, had failed to establish a *prima facie* case for the voluntariness of the petition, and that the petition ought to be found to be involuntary without the case proceeding further. The applicant submitted that it not be put to its election before being able to make the non-suit motion; specifically, it argued that it not be required to indicate to the Board whether it intended to call any evidence, should its motion be unsuccessful, prior to being allowed to argue the motion on its merits. After hearing the submissions of the parties on this issue, the Board ruled that the applicant would not be required to make an election as to whether it wished to call any evidence, should the hearing proceed, and that it could proceed to make its motion for non-suit without so electing. Our reasons for this ruling will issue at a later date.
3. We now provide our reasons for not requiring the union to elect whether it wished to call evidence.
4. When parties bring motions for non-suits in civil proceedings in the Province of Ontario, there is a general practice, although not inviolate, that parties bringing such motions be put to their election prior to the court entertaining the motion. See, in this respect, *Bank of Montreal v. Horan et. al.* (1986), 54 O.R. (2d) 757; *The Ontario Public Service Employees Union et. al.* (1990) 37, O.A.C. 218 (Div. Ct.). But proceedings before the Board are not identical to proceed-

ings before the civil courts. Rules or practices that may well make sense in a civil court context do not necessarily attend in proceedings before this Board.

5. Administrative tribunals which adjudicate matters often conduct proceedings in a less formalized, less adversarial fashion than a court would. Provided it acts in a manner that is fair, and in accordance with the principles of natural justice, the courts have generally declined to insist that the tribunal follow the court models exactly. Recently, the Divisional Court in *Metropolitan Toronto v. The Joint Board et. al.* (unreported), November 19, 1991, per O'Brien J., commented on the distinction between courts and administrative tribunals in certain respects. As the court observed:

In my view the Board dealt correctly with this argument. It considered the way non-suit is normally dealt with in civil proceedings. It then noted the proceedings before it were quite different than those of a civil proceeding and that Vaughan's motion was more accurately described as a motion of early dismissal. The Board also noted that when it was satisfied (as it must have been) that the application could not possibly succeed, no matter what evidence might come forward, it could provide relief from costs of lengthy and costly proceedings.

In conclusion, I see no error in the approach or conclusions reached by the Board nor in the manner in which the Board exercised its discretion in the control of the proceedings before it.

See, in contrast, *Ontario Public Service Employees et. al.* (*supra*), at paragraphs 40 and 41.

6. The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put a party to its election. In this regard, the Board will no doubt consider all of the circumstances, including the need for fair, efficient, and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case, the moving party must make its election. To so conclude would be to fetter our discretion, in an area where the Legislature has not indicated that the civil court rules or practices ought to apply. It would be inconsistent as well with the Board's general authority, in section 104(13) of the Act, to "determine its own practice and procedure" provided it gives full opportunity to the parties to any proceedings to present their evidence and to make their submissions.

7. Returning to the facts of the instant case, the only issue being litigated before the Board was the voluntariness of the petition filed by the petitioners in opposition to the certification application. The petitioners proceeded first with their evidence, to be followed by the company, and then the union. After the evidence of the petitioners had been led, and after the company indicated it did not have any evidence to call, the union made a motion for non-suit, arguing that the petition ought to be dismissed as it was clearly involuntary. Thus, the petitioners, who had the onus of establishing the voluntariness of their petition, had proceeded first, they had led all their evidence, and the employer had been given an opportunity to lead any evidence it wanted.

8. When the union brought its motion, it asked that it not be put to its election prior to being allowed to argue the merits of the motion for non-suit. The company supported the union's request that it not have to elect. The petitioners did not take a position on the requirement of an election. They did not suggest that the election had to be made. In short, no party was asking that the union be put to its election.

9. In these circumstances, where it might significantly delay the resolution of matters, to the detriment of sound labour relations in the workplace, and given that the other parties did not

request that the election be made, the Board decided not to require the union to elect whether it wished to call evidence before hearing its motion.

10. Our decision was context specific, based on the the circumstances and facts before us. In response to the union's request, and given the parties' positions, it appeared both fair and sensible to allow the union an opportunity to argue in essence that there was no case for it to meet, before requiring all the parties to engage in further, extensive litigation.

11. The Board might well on its own initiative adopt such an approach. (see O'Brien, J. comments in *Metropolitan Toronto, supra*, p.5). All parties must, of course, be treated fairly and have full opportunity to lead their evidence and make submissions. Consistent with this, however, there will be proceedings where there is no useful purpose served by requiring a party opposite in interest to lead its evidence when the evidence of the party having the onus is clearly insufficient to meet that onus. The Board might call upon the parties to make submissions or otherwise conduct the balance of the proceedings in a manner that will not unduly delay the resolution of the labour relations dispute. In such circumstances, to force all the parties to incur additional expense and delay, when there is no reasonable likelihood of success in the issue, may not be consistent with sound labour relations principles or with sound administrative tribunal practice.

12. For the above reasons, the Board did not require an election of the union when it brought its motion for non-suit.

4015-91-R Muller's Meats Employees Association, Applicant v. Muller's Meats Limited, Respondent v. Retail, Wholesale and Department Store Union AFL:CIO:CLC, Intervener

Certification - Collective Agreement - Timeliness - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *G. Black*, *Dan Chamberlain* and *Chris Smith* for the applicant; *C. Humphrey* and *H. Muller* for the respondent; *Bernard Hanson*, *Bob Low* and *Jim Waters* for the intervener.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN; August 13, 1992

1. This is an application for certification in which the applicant seeks to displace the intervener Retail, Wholesale and Department Store Union, AFL:CIO:CLC ("RWDSU") as the bargaining agent of certain employees of the respondent.

2. By decision dated April 21, 1992, the Board (differently constituted) found the applicant to be a trade union within the meaning of the *Labour Relations Act*.

3. The RWDSU submits that this application is untimely. Other than that, all other matters in issue herein have been resolved.

4. In that respect, and having regard to the material before the Board and the agreement of the parties, the Board finds that "all employees of the respondent in Niagara Falls, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, drivers", constitute a unit of employees of the respondent appropriate for collective bargaining. This is the bargaining unit which is the subject of this application.

5. Further, the Board is satisfied, having regard to the material before it, that more than fifty-five per cent of the employees in the bargaining unit at the time the application was made, were members of the applicant on March 27, 1992, the terminal date fixed for the application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time at which such membership should be ascertained for purposes of section 7 of the Act.

6. Subject to the RWDSU's timeliness objection, the applicant is entitled to a representation vote with respect to its application.

7. The basis of the RWDSU's objection is that there was a collective agreement in effect between it and the respondent until December 31, 1991, that notice to bargain was given under that agreement, and that section 62 of the Act operates to bar this application.

8. The *Labour Relations Act* provides, in section 1(1) that a collective agreement is:

"... an agreement means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement";

It is now well settled that it is not necessary that there be a single document signed by both parties in order for there to be a collective agreement between them. However, it must be clear that collective bargaining between the parties ended with an agreement and there must be sufficient documentation of that agreement to permit the precise terms thereof to be determined (*Sears Canada Inc.*, [1986] OLRB Rep. Aug. 1159; *Mississauga Hydro Commission*, (1984) 17 LAC (3d) 299 (Picher), application for judicial review dismissed June 21, 1985, unreported; *Canteen of Canada Ltd.* (1984) 15 LAC (3d) 305 (Mitchnick); *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221).

9. The RWDSU called four witnesses and filed numerous exhibits. Neither the applicant nor the respondent called any witnesses.

10. The RWDSU has represented the bargaining unit herein since being certified on July 16, 1987. A collective agreement between it and the respondent in that respect expired on December 31, 1989. Negotiations for a new agreement began in November, 1989 and continued in 1990. When an agreement could not be reached, a legal strike began on July 5, 1990. On the same day and at the request of Henry Muller (a principal of the respondent), the parties continued their negotiations at a donut shop. In the course of several hours of discussion, the parties reached further agreements and broke off their meeting. The RWDSU called a meeting of bargaining unit

employees, explained what had transpired, and called for a vote. A majority of the assembled employees voted to return to work on the basis of what had been reported to them and they in fact did so.

11. Subsequently, the RWDSU prepared a memorandum of settlement which was forwarded to the respondent. The respondent did not sign this. The RWDSU then prepared and send to the respondent a document it titled as being a "Collective Agreement" between them. The respondent did not sign this document either. The Board heard evidence of what transpired between the parties between November, 1989 and March, 1992. We find it neither necessary nor useful to review that evidence in detail. However, we note that what did not happen is as significant as what did.

12. Certain significant matters were settled prior to and at the July 5, 1990 meeting. However, it is apparent on the RWDSU's own evidence that not everything was resolved.

13. A RWDSU "memo" which accompanied the memorandum of settlement sent to the respondent as aforesaid itself states that there were "... matters of red circles and some new language to be worked out to our mutual satisfaction at a later date before preparing the final agreement". On the evidence, this "new language" referred to the Union Education Fund (article 22) proposed by the RWDSU, the Employee Assistance Program (article 23), and a bonus plan (in Schedule A). The RWDSU's proposals that the fund, program and bonus plan be established had been accepted in principal, but the particulars of none of them had been agreed to. Indeed, the RWDSU conceded that the respondent specifically rejected the employee assistance program language it proposed, for the first time, in the memorandum of settlement it drafted.

14. The subsequent "collective agreement" document prepared by the RWDSU deleted any reference to "red circling" and picked up the Education Fund provisions set out in the memorandum of settlement. There is no evidence that these matters had been agreed to by or even discussed further with the respondent. This document also included the retroactivity provisions which appeared in the memorandum of settlement. Although one union witness (Fuller), who was the RWDSU chief negotiator up to and including July 5 and who prepared the memorandum of settlement and "collective agreement" documents, testified that he believed retroactivity had been agreed to, his evidence was less than unequivocal, lacked detail, and was not corroborated by any other evidence including his own very extensive notes. Similarly, the "collective agreement" document contained a duration clause different from that contained in the memorandum of settlement and which had not been specifically agreed to by or discussed with the respondent. We are not satisfied that retroactivity had been agreed to as suggested by the RWDSU. The "collective agreement" document also included the Employee Assistance Program provision which had been specifically rejected by the respondent. Finally, it included a bonus plan provision which though agreed to in principle on July 5, 1990 the RWDSU's own memorandum of settlement document states that the parties had yet to agree specific language therefor.

15. In the result, while the parties had settled significant number of collective bargaining issues between them, several matters remained to be bargained and settled; namely, retroactivity, red-circling, the Education Fund language, the particulars and language of the Employee Assistance Program and the language of the bonus plan.

16. In that respect, we find Fuller's testimony with respect to the July 5 meeting, the bargaining unit employees called by the RWDSU telling. He testified that the issues had been "narrowed" and that in light of the issues resolved a verbal explanation, with a blackboard in aid, was given to the employees with respect to what the RWDSU itself said was the crucial issue - money. There is no evidence that the employees were presented with the total package which the RWDSU

asserts was the collective agreement reached, or that the vote with respect to a collective agreement rather than merely a return to work. It is not unheard of for striking employees to return to work even though a collective agreement has not been reached, and, in all of the circumstances of this case, we are satisfied that is a return to work which the bargaining unit employees voted on here.

17. Evidence of subsequent events indicates that many, if not all, of the matters which had been agreed to on or before July 5, 1990 were subsequently implemented by the respondent. However, the evidence also indicates that the Employee Assistance Program was never implemented. Further, the evidence is not sufficient to establish that any retroactive payments were made, that there was no more red-circling, or that the bonus plan was implemented. Further, the RWDSU did very little, if anything, to get the respondent's signature on a collective agreement document, even though it knew or ought to have known that the respondent was not implementing all of what the RWDSU asserts was the collective agreement. Consequently, while the RWDSU argues that the evidence of such subsequent conduct indicates that the parties acted as though there was a collective agreement between them, we find it equally suggestive of the employer implementing those agreed to items which had caused the bargaining unit employees to end their strike and return to work so that it could continue its operations, and that the respondent was continuing to deal with the RWDSU as its employees' bargaining agent.

18. The evidence with respect to negotiations which took place in 1992, prior to this application is similarly equivocal. It suggests that the respondent was picking up negotiations where they had left off and treating the "collective agreement" document prepared by the RWDSU in 1990 as a basis for those discussions as much as it does that the respondent had accepted that document as being a collective agreement between it and the RWDSU.

19. By July 5, 1990, the RWDSU and the respondent had agreed to the basis for a collective agreement. However, upon considering all of the evidence before the Board, we are not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement which the RWDSU asserts existed can be ascertained, either on the documentary evidence before the Board or otherwise. Accordingly, we are not satisfied that there is any bar to this application, and the RWDSU's objection in that respect is dismissed.

20. The Board therefore directs that a representation vote be taken. All employees employed in the bargaining unit described in paragraph 4 above, on the date hereof, who are so employed on the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the applicant or the intervener (there will be no "no-union" option) in their employment relations with the respondent.

21. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER PAT V. GRASSO; August 13, 1992

1. Having reviewed the evidence and submissions of the parties I would rule that there is a bar to the application for certification by the association.

2. I am satisfied that both the company and union walked away from the meeting of July 5, 1990 with the understanding that they had reached an agreement on all items in dispute.

3. The evidence is that the union called a meeting of its members, explained the terms of agreement and recommended that it be accepted. A majority of the members voted to accept the

agreement and return to work. After the vote the union notified the company by phone that the new agreement had been ratified.

4. The behaviour of the company and the way it dealt with matters pertaining to the union after July 5, 1990, left no doubt in any one's mind that the company operated as if there was a collective agreement in force.

5. Between 1990 and early 1992 the union processed grievances on behalf of its members. Some of them were solved and some referred to arbitration. At no time did the company object in dealing with the grievances.

6. Mr. Dan Chamberlain was a member of the RWDSU negotiating committee during the 1990 negotiations. He attended the hearing on behalf of the applicant but did not take the stand to contradict any of the Union's evidence. I take it that Mr. Chamberlain agreed with the union's characterization of what had taken place between July 5, 1990 and early 1992 and decided nothing.

7. Mr. Henry Muller who did the negotiations for the company was also present at the hearings. He also chose not to testify. I can only conclude that Mr. Muller fully agreed with the union's evidence including its assertions of negotiations, having reached an agreement on all items, ratification of the agreement, having been notified of ratification, implementing the term of the agreement, accepting and dealing with grievance, accepting proposals for renewal of the collective agreement and replying to the union proposals with counter proposals of its own.

8. It appears to me that every one conducted their day-to-day business as if there was an agreement in effect. I would dismiss the application for certification as being untimely.

0237-91-R, 0238-91-R, 0239-91-U Canadian Paperworkers Union Local 1150, Applicant v. Paperboard Industries Corporation and Specialized Packaging Products Ltd., Respondent

Sale of a Business - Board determining that acquisition by "S" of certain assets of "P" at plant near Bradford and assignment to S of P's lease for those premises constituting sale of a business - Board declaring that S bound by union's collective agreement with P

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. G. Wozniak* and *A. Hershkovitz*.

APPEARANCES: *Dave Watson, Jim Foster and Elwood Tinney* for Canadian Paperworkers Union Local 1150; *June Ford, J.G. Boudreau, Elizabeth Stairs and David Deering* for Paperboard Industries Corporation; *James E. Bowden and Harry Irving* for Moore Packaging Corporation Ltd.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER A. HERSHKOVITZ; August 5, 1992

1. These are applications made under subsection 1(4) and section 64 [formerly section 63] of the *Labour Relations Act* and a complaint made under section 91 [formerly section 89] of the Act. For ease of exposition, the Board will refer to Canadian Paperworkers Union Local 1150 as "the applicant" or "the Union"; to Paperboard Industries Corporation as "Paperboard"; and to

Specialized Packaging Products Ltd. as "Specialized". The application and the complaint were brought on for hearing together. At the outset of the hearing, the complaint was stood down on consent until the Board determined the applications. Later in the proceedings, the Union and Paperboard agreed that the complaint and the application under subsection 1(4) of the Act (File No. 0238-91-R) should be withdrawn as against Paperboard and the Board so directed. The applicant also sought to withdraw the subsection 1(4) application as against Specialized. Absent consent from Specialized, the Board ruled that the parties could deal with its disposition in final argument. When that time came, counsel for the applicant advised the Board that he would make no submissions on that application.

2. Accordingly, the complaint under section 91 in File No. 0239-91-U and the application under subsection 1(4) in File No. 0238-91-R are withdrawn as against Paperboard Industries Corporation and the same application is dismissed as against Specialized Packaging Products Ltd. Therefore, the remainder of this decision deals with the application under section 64 of the Act in File No. 0237-91-R.

3. The applicant seeks declarations that Specialized is the successor employer to Paperboard as the result of a sale of a business within the meaning of section 64 of the Act from Paperboard to Specialized, that the applicant continues to be the bargaining for the employees of Specialized in a like bargaining unit in that business and is bound to the collective agreement between the applicant and Paperboard which was in effect from August 18, 1988 until August 17, 1991. The relevant provisions of section 64 are:

64. (1) In this section,

"business" includes a part or parts thereof;

"sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 54, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 54, as the case requires.

4. The transactions between Paperboard and Specialized which the applicant alleges constitute a sale of Paperboard's business, or part thereof, to Specialized, are an agreement of sale and purchase by which Specialized acquired certain assets of Paperboard at a plant which it had operated at Holland Landing near Bradford, Ontario ("the Holland Landing plant") and an assignment to Specialized of Paperboard's lease for those premises and the property on which they were located.

5. Paperboard is an integrated box making company which manufactures corrugated sheet from linerboard and paper and manufactures boxes from the corrugated sheet. Specialized is known in the paper industry as a "paper converter" or a "sheet plant". Those interchangeable terms apply to box companies which manufacture boxes from corrugated sheet purchased from an independent manufacturer of sheet. Such independent manufacturers of corrugated sheet are known in the paper industry as "feeder plants". Prior to the alleged sale, Specialized obtained its corrugated sheet from Independent Corrugators, a company owned in equal shares by Specialized and three other paper converter companies. The four companies are competitors for box sales in the same market area.

6. Paperboard and Specialized are also competitors for box sales in the same market. They were before the alleged sale and continue to be afterward. Paperboard sells primarily to high volume users of corrugated boxes. Specialized sells to smaller customers and produces and sells specialized packages with a high labour cost content. The Union has bargaining rights for Paperboard's employees at the Holland Landing plant and its plant on Kennedy Road in Mississauga. The Union, or a related Local, also has bargaining rights for the employees of Specialized at its plant in Barrie and for the employees of Innovative Corrugated Industries Ltd. in Oakville. They are owned by the same holding company.

7. Independent Corrugators supplied corrugated sheet to Innovative, as well as Specialized. During 1990, Peter Moore, whose holding company owns Specialized, became dissatisfied with the financial arrangements respecting Independent Corrugators because his companies' share of Independent's profits were unfavourably disproportionate to their purchase of corrugated sheet from it. When Moore's efforts to have this situation adjusted were unsuccessful, he began a search for a corrugator which he could buy. When the Board uses the term "corrugator" in this decision respecting the transactions between Paperboard and Specialized, unless the context clearly indicates otherwise, it refers to all of the machinery which together is necessary for the manufacture of corrugated sheet. Moore began his search through equipment dealers in North America and Europe. In September, Paperboard announced publicly the Holland Landing plant would be closed. Moore learned from a United States trade catalogue that the equipment was for sale. He inquired with Paperboard about the corrugator but was told it was not for sale in Canada. The plant closed and employment ceased in mid-October. John Kent, the plant manager, was retained for a while to oversee the dismantling and removal of equipment as it was sold. When another suitable job in Paperboard did not materialize, he took a severance offer and resigned effective December 31, 1990.

8. By the time the Holland Landing plant closed, Moore was negotiating with Paperboard for the purchase of the corrugator on the basis of an undertaking that Specialized would buy containerboard, the paper materials from which corrugated sheet is made, from Paperboard, and Paperboard would buy from Specialized coated corrugated sheets and certain of the paper waste from the corrugation process. They exchanged draft letters of intent in late October, but negotiations had stalled by mid-December because of a dispute between Paperboard and its landlord about the assignment of Paperboard's lease to Specialized. Moore wanted either an acceptable lease assignment or a price adjustment to accommodate the cost of removing the corrugator to Specialized's Barrie plant. Negotiations resumed in early 1991 and were eventually concluded so that Specialized could take over Paperboard's lease and operate the corrugator at the Holland Landing plant. Paperboard took possession on April 15, 1991.

9. When negotiations were completed, Specialized had:

- (1) an assignment of lease from Paperboard for the property and prem-

ises comprising the Holland Landing plant, consented to by the landlord;

- (2) an agreement of sale and purchase for all of the equipment comprising the corrugator, spare parts for the equipment and maintenance items;
- (3) an indemnity agreement making Paperboard responsible for restoring the leased premises to an environmentally satisfactory condition and indemnifying Specialized and Moore personally from any liability arising out of any failure by Paperboard to complete the environmental restoration; and
- (4) a containerboard sales agreement with Paperboard for the supply of containerboard to Specialized at the Holland Landing plant and for the sale to Paperboard of coated corrugated and certain waste paper.

Specialized also purchased 300 tons of paper for making corrugated sheet which was in inventory at the plant.

10. Moore had approached Kent in December about working for Specialized if it completed an agreement for purchase of the corrugator and assignment of the lease. Since Kent was still on Paperboard's payroll, Moore got permission to speak with him. They came to an arrangement which resulted in Kent eventually going on Specialized's payroll on April 15, 1991. Moore's original plan had been to hire a general manager for the plant who had experience managing corrugated sheet production. However, after Moore's first negotiations with the landlord and discussions about the Holland Landing Plant's water and sewage systems, he began thinking about Kent. Later, during Moore's second visit to see the corrugator, Kent expressed to him an interest in working for Specialized if it purchased the corrugator. Moore questioned Kent about the water and sewage systems, and the groundwater problems, and came to realize that Kent had an intimate knowledge of the corrugator and of the premises and property, including problems with the water supply, groundwater pollution and the idiosyncrasies of the corrugator. Kent also had prepared an inventory of all of the equipment, spare parts and maintenance items in the plant for Paperboard and he knew what their condition was as at October 15. One of the sale conditions in the draft letters of intent exchanged by Paperboard and Specialized in late October was that the machinery and equipment were being sold and purchased "... on the basis of the condition..." as at October 15. That condition is part of the final sale agreement and all of the items on the list of machinery and equipment which is part of the agreement's contents, were on the inventory list prepared by Kent. Moore acknowledged that Kent knew everything needed to make the corrugator work, including how to deal with the water supply and ground water problems. Moore made it clear to Kent that he would want to have the corrugator up and operating as soon as an agreement was reached with Paperboard. Kent assured Moore that this was possible.

11. Kent had a list of former Paperboard employees and by April 16 he had hired 16 of them needed to operate and maintain the corrugator, plus a clerk and schedules for the office. He had a crew of three come in for some preparatory work before start-up on April 15. Moore left it up to Kent as to who should he hire and when Moore had made it clear that he wanted the corrugator operational immediately, Kent decided that he would hire ex-Paperboard employees who knew the equipment and whose capabilities he knew. He had received the go-ahead in early March to make tentative hiring arrangements. He began with a crew of seven or eight and had the corrugator running by April 24th. The following Monday, April 29th, he had a full crew working and producing market quality corrugated sheet.

12. Once Moore was assured that the corrugator was functional, he advised Independent that Specialized and Innovative would not be buying corrugated sheet from Independent after May 1st. Specialized and Innovative sold back all of their shares in Independent to it and Moore resigned as a director of Independent.

13. Specialized and Innovative were merged effective May 1st, together with three other companies owned by Moore's holding company, into Moore Packaging Corporation ("Moore Packaging"). On the same day, Moore, as president of Moore Packaging, issued an announcement of the merger to customers of Specialized and Innovative. It contained the following reference to the Holland Landing plant:

As well, we wish to announce the acquisition of Paperboard Industries shutdown Bradford Plant, and the 87" S & S corrugator installed there. This plant will reopen today and also operate under the Moore Packaging name.

The latest acquisition will allow us to continue to supply you with the service and quality that you deserve at a competitive price. ...

14. The Holland Landing plant produces approximately 17 million square feet of corrugated sheet per month, of which approximately 13 million is used by the Moore Packaging box plants. The remaining four million square feet is sold on the open market. Paperboard takes slightly more than one per cent of the surplus under its commitment in the containerboard sales agreement with Specialized. The rest of the surplus is sold to other paper converters. While Specialized did not get any customer information from Paperboard, purchasers have included all but one of Paperboard's customers formerly supplied from the Holland Landing plant. None had been customers of Specialized.

15. The Holland Landing plant continues to dispose of baled waste to the same dealer that Paperboard had used.

16. The parties do not dispute those facts, only the conclusions which the Board should draw from them respecting section 64 of the Act. The Board has reviewed and considered their arguments in full in making its decision, but has not attempted to set out the parties' detailed arguments. Instead, they are summarized below.

17. Applicant counsel submits that all of these circumstances add up to a sale of part of Paperboard's business to Specialized. He argues that Specialized acquired much more than a parcel of idle assets and a property lease when it acquired the corrugator. According to counsel, when Specialized acquired the corrugator, its ancillary equipment and the plant infrastructure, it acquired the heart and lifeblood of Paperboard's box-making business at the Holland Landing plant. That is not all that Specialized got, counsel argues. It got Paperboard's former plant manager and enough of its former employees to make up the crew needed to operate the corrugator and run the office right from the closing date of the transactions. In Kent it got the person who had the knowledge to assemble the crew of employees and how to deal with the idiosyncrasies of the equipment and plant infrastructure. So there is a total continuity of the corrugating operations and everything in place to constitute a ready-made business, with Kent to put the whole thing into operation. Counsel submits, as well, that there was a continuity of Paperboard's corrugated sheet customers, none of whom had been customers of Specialized, a continuity of containerboard supply and baled waste disposal. All of which, according to counsel, leads to the inescapable conclusion that Specialized has acquired a significant part of Paperboard's business at the Holland Landing plant. Counsel referred the Board to *W.F. Stevens Reproductions Inc.*, [1984] OLRB Rep. Apr. 674; *Thorco Manufacturing Limited*, 65 CLLC ¶16,052; *The Tatham Company Limited*, [1980] OLRB Rep. March 366; *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, and

Dufferin Steel Company Amico Division, [1976] OLRB Rep. March 81 referred to therein at paragraph 4 for the remedial purpose of section 64 and the attendant need to serve that purpose by interpreting the section liberally. With respect to what constitutes a business, counsel referred the Board to *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887; *Thorco Manufacturing, supra*, and *Beef Terminal (1979) Limited*, [1980] OLRB Rep. Aug. 1167. For the tests which the Board has applied in determining whether there has been a section 64 sale of a business, counsel relied on *Culverhouse, supra*, *Marvel Jewellery Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733 referred to at paragraph 7 of *Culverhouse*, and *Tatham Company, supra*. Finally, counsel referred the Board to the following decisions for their alleged factual similarity to this application: *Bermay Corporation Limited*, [1979] OLRB Rep. July 608; *Big Bear Storage*, [1979] OLRB Rep. March 164; *Culverhouse, supra*, and *Tatham Company, supra*.

18. The argument of Specialized's counsel runs as follows. At all material times, Specialized and Paperboard were competitors and Specialized already had its own corrugator when it purchased some idle assets from Paperboard for which Paperboard had no use. Specialized already had its own organization which it brought to the Holland Landing plant and, when it was put together with the transaction respecting the corrugator, all it amounted to was a change in the legal form through which Specialized operated the corrugator end of its business. The location, equipment, employees and people who supplied Specialized with corrugated sheet before and after the transaction were simply incidental to the corrugator part of Specialized's business. The employees were useful, but not critical to the transaction. In short, Specialized did not acquire from Paperboard the elements of a business which support employment, it merely got a collection of idle assets which could be used to expand an existing parallel business. Counsel referred the Board to *SenStar Corporation*, [1989] OLRB Rep. Nov. 1159; *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732; *Sunnybrook Food Market (Keele) Limited*, [1974] OLRB Rep. Jan. 47; *Canada Cement Lafarge Ltd.*, [1975] OLRB Rep. Dec. 905; *British American Bank Note Company Limited*, [1979] OLRB Rep. Feb. 72; *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663; and, *Dominion Stores Limited*, [1979] OLRB Rep. July 626. He relies on *SenStar, supra*, for its review of Board jurisprudence, particularly *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; on *Woodway, supra*, as an example of the elements of the alleged sale being a new business; on *Sunnybrook* and *Canada Cement, supra*, as examples of the sale and purchase of unwanted assets; and on *Sunnybrook*, *British American Bank Note*, *Grand Valley Ready Mixed* and *Dominion Stores, supra*, as examples of transactions carried out between companies carrying on parallel businesses where the results of each transaction is more likely an expansion of the purchaser's business than the acquisition of the seller's business.

19. In determining whether what Paperboard sold to Specialized was part of Paperboard's business for purposes of section 64 of the Act, it is essential to keep in mind the remedial purpose of the section. The Board described that purpose in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 702, quoted at paragraph 19 of the *Tatham Company, supra*:

"The purpose of section 47a [now section 55] [now section 64] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. the first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect "paper transactions", and are a form of corporate charrade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond 'paper transactions' to achieve that purpose. See e.g. *Kem's Masonry*, [1964] OLRB REp. Dec. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming

the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the BOard is interested in maintaining the bargaining rights where the sale involves a continuation of the business."

to which the Board added those observations at paragraph 20:

20. Section 55 prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business." To accomplish this objective, the statute gives a very special meaning to the word "sale", envisages that bargaining rights can be continued in a severable "part" of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

20. That purpose causes the Board to look beyond the legal forms of the businesses and the commercial transactions between them which give rise to section 64 applications and, instead, to focus on examining the predecessor's business to which the bargaining rights attach, and to determine whether that business, or part of it, has been disposed of to the successor, or whether there is a continuation of the predecessor's business, or part of it. Inherent in the determinations is the question of whether what was disposed of to the successor or continues with it, is the predecessor's business, or a part of it, and not just a collection of its surplus assets. The difficulty of that task was recognized by the Board in *Tatham Company*, *supra*, and described at paragraph 26:

26. All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a "mere sale of assets" and a sale of "part of a business." As the BOard commented in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1194 at paragraph 34:

"This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business" or 'a part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided."

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases which raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of a business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 [now section 64] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

As those comments indicate, the Board has looked to a wide range of factors to assist it in determining whether there has been a section 64 sale of a business, many of which are referred to in the foregoing quote. The caution about their use expressed more than three and one-half years earlier in *Culverhouse Foods, supra*, at paragraph 16, was valid when the *Tatham Company* was decided and remains so today:

• • •

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it was before, i.e. whether there has been a continuation of the business.

21. The facts in the case are that Specialized acquired from Paperboard all of the real property and premises which made up its Holland Landing Plant together with the corrugator machine and its associated equipment essential for the manufacture of corrugated sheet. These were not peripheral to Paperboard's business at the Holland Landing Plant. They were central to its integrated boxmaking operations. On the evidence before the Board, the corrugator was accurately described by applicant counsel as the heart and lifeblood of Paperboard's business at the Holland Landing plant of producing corrugated paper boxes. In substance, Specialized took over an essential part of Paperboard's business at the Holland Landing plant: its location and its production capacity for corrugated sheet. Specialized also acquired from Paperboard a source of linerboard for the corrugator and an agreement that Paperboard would take a small part of the corrugator's production and some of the paper waste from its operations. Other baled waste also goes to the same disposal facility as was used by Paperboard. Specialized hired Kent and 14 other former Paperboard employees, all of whom had experience applicable to the operation and maintenance of the corrugator, and two office employees. In Kent, Specialized got all of the knowledge needed to get the corrugator up and running and keep it that way. This is because he had an intimate knowledge of the plant and its infrastructure, the water supply and groundwater problems, the corrugator machine and its idiosyncrasies, and the associated equipment. Specialized also got the benefit of his knowledge of the former employees and their capabilities respecting the operation and maintenance of the corrugators. Also, in Kent, along with the other former Paperboard employees whom he hired for Specialized, it got a ready-made workforce who were able to bring the corrugator to full operation within a week of the closing date.

22. As a result, shortly after Paperboard and Specialized completed their transactions, Specialized was producing corrugated sheet in Paperboard's former plant, on its former corrugator manned entirely by its former employees for Specialized's own use and for sale in the market. At first, there was no surplus corrugated sheet to sell on the market, but, by June Specialized began producing and selling surplus corrugated sheet. By August it was producing thirteen million square feet for its own use and four million square feet for sale. Specialized was shipping the surplus to all but one of Paperboard's former customers, none of whom had been customers of Specialized.

Thus, there is a continuity of some of the same work by some of the same employees, producing for Specialized one of the same products for most of the same customers as was done previously for Paperboard. As the Board observed in *Metropolitan Parking Inc.*, *supra*, at paragraphs 31 as referred to at paragraph 8 of *SenStar Corporation*, *supra*, “[i]f the elements formerly used by [the vendor] to carry on business are now in the hands of [the purchaser], and used for the same business purpose, it is difficult to resist the conclusion that there has been some form of transfer from [the vendor] to [the purchaser] ...”; and further, at paragraph 32, after referring to the significance of the purpose of section 64 to preserve bargaining relationships and collective agreements, “[i]f the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of [section 64]”. Seen from the perspective of the former Paperboard employees now employed by Specialized, the same grounds which support that inference in this case would make it reasonable for them to conclude that not much has changed except for the name of their employer. They continue to work in the same location, under the same plant manager, on the same corrugator machine, using the same skills and the same materials to turn out the same product, corrugated sheet. They could not be faulted in those circumstances from concluding that the business in which they continue to work has been transferred from Paperboard to Specialized.

23. While it is clear that all of the elements of Paperboard’s business at its Holland Landing plant did not find their way into Specialized’s possession, there is little doubt that those elements which did were a coherent and severable part of Paperboard’s economic organization at that location. While Paperboard had an integrated corrugated box manufacturing operation at the plant, a separate market existed for the corrugated sheet which was surplus to its requirements. The facts also establish that “stand alone” corrugated sheet plants exist in the paper industry. Independent is an example. There is nothing in evidence before the Board which suggests that what Paperboard left behind at its Holland Landing plant was not a severable part of its business and those same elements appear to have provided Specialized with a business opportunity at the Holland Landing plant which it could pursue on its own and to its own advantage.

24. In order to determine whether what Specialized has acquired is part of Paperboard’s business, the Board must consider Specialized’s acquisitions in the business context of its transactions with Paperboard. Specialized did not acquire from Paperboard any introduction to its corrugated sheet customers, accounts receivable, finished inventory, patents, trade marks, logos. Paperboard did not surrender its ability to compete with Specialized for corrugated sheet sales. It continued to operate as an integrated paper box manufacturer serving the same markets for paperboxes and corrugated sheet as prior to the sale, but from Kennedy Road in Mississauga. Specialized also had its own economic organization based in Barrie operating its business of paper converter. While it had an external source of corrugated sheet, it was not in the business of manufacturing corrugated sheet, except as one of four equal partners in Independent Corrugators. Specialized’s only influence over Independent was as a shareholder and a customer, and through Moore as a director. That is made clear by Moore’s inability to redress to his satisfaction his concerns about the financial arrangements respecting Specialized’s relationship with Independent. Clearly it is Independent that is in the business of manufacturing and selling corrugated sheet, not Specialized. What Specialized acquired from Paperboard has given it a ready-made entry to that part of the paper industry and enabled it to compete with Paperboard and other integrated box manufacturers in an area of the paper industry market where it has not previously competed. This is so even though Specialized did not get from Paperboard any introduction to its corrugated sheet customers, or any of its accounts receivable, finished inventory, patents, trade marks or logos. The market for corrugated sheet is very price sensitive and customer loyalty to a particular supplier is not significant. Therefore, Specialized would have little need, if any, for any introduction to Paper-

board's customers or for its accounts receivable. In fact, Specialized did not need either because it is selling surplus corrugated sheet to all but one of Paperboard's former customers. Whether or not Paperboard held any patents or trade marks which it did not dispose of to Specialized, Specialized did not need them for the manufacture and sale of corrugated sheet, and the same can be said for any Paperboard logos.

25. The Board is satisfied that Specialized has been able to do this not by the expansion of its business into the Holland Landing plant but by the transfer from Paperboard to Specialized of a severable part of Paperboard's business at that location in the form of the assignment of Paperboard's lease for the land and premises, the sale of the corrugator and the employment of Kent and the other former Paperboard employees to operate the corrugator. Everything that was needed in the way of capital and human resources to operate a business of manufacturing corrugated sheet at the Holland Landing plant have been transferred to Specialized.

26. The circumstances in this application are readily distinguishable from those which faced the Board in *Sunnybrook*, *British American Bank Note*, *Grand Valley Ready Mixed*, and *Dominion Stores*, *supra*. Also, this case clearly is not one which involves the transfer of work previously performed by Paperboard's employees without the transfer of significant elements of Paperboard's business, a situation not covered by section 64. In that respect, see *British American Bank Note*, *supra*, at paragraph 11.

27. Therefore, in all of the circumstances of this application and having regard to the purpose of section 64, the Board finds that the transactions between Paperboard Industries Corporation and Specialized Packaging Products Ltd., constitute the transfer of part of the business of Paperboard Industries Corporation to Specialized Packaging Products Ltd. within the meaning of section 64 of the Labour Relations Act.

28. The parties agreed that, should the Board find that there has been a section 64 sale of a business as between those parties, in view of the merger of Specialized Packaging Products Ltd., into Moore Packaging Corporation, the declaration should be made respecting the latter entity. Therefore, pursuant to subsection 64(2) of the Act, the Board declares that Moore Packaging Corporation, is bound to the collective agreement between the Canadian Paperworkers Union, Local 1150 and Paperboard Industries Corporation which was in effect from August 18, 1988 until August 17, 1991 as if it had been a party to the agreement.

29. In summary:

- (1) the application under subsection 1(4) of the *Labour Relations Act* in File No. 0238-91-R has been withdrawn as against Paperboard Industries Corporation and the Board has dismissed it as against Specialized Packaging Products Ltd.;
- (2) the Board has found that there has been a sale of a business within the meaning of section 64 of the Act from Paperboard Industries Corporation to Specialized Packaging Products Ltd., and has declared that Moore Packaging Corporation, into which Specialized Packaging Products Ltd. has been merged, is bound to the collective agreement between the Canadian Paperworkers Union, Local 1150 and Paperboard Industries Corporation which was in effect from August 18, 1988 until August 17, 1991 as if it had been a party to the agreement;

- (3) the complaint under section 91 of the *Labour Relations Act* in File No. 0239-91-U which was stood down on consent of the parties has been withdrawn as against Paperboard Industries Corporation; and,
- (4) insofar as the complaint stands against Specialized Packaging Products Ltd., the complainant shall advise the Registrar whether it intends to proceed with the complaint.

DECISION OF BOARD MEMBER D. G. WOZNIAK; August 5, 1992

1. I respectfully dissent from the decision of my colleagues.
2. On the facts, as determined by the evidence in this case, I would not make a finding that there has been a sale of a business or part of a business as the Board has applied those terms in prior decisions. I find the facts here are more indicative of Moore having purchased certain assets of Paperboard Industries, specifically the corrugator (as in the majority decision this term refers to all of the machinery necessary for the manufacture of corrugated sheet).
3. The assignment of the lease for the Holland Landing premises and subsequent hiring of certain of Paperboard's former employees was incidental to and in no way a condition, precedent or subsequent, to the transaction, the subject of which was Moore's initial and primary interest, namely the purchase of the corrugator.
4. In making a determination as to whether a sale has taken place within the meaning of section 64, there are a myriad of factors that may be considered. No one factor or factors taken together is necessarily determinative of the issue. I would adopt the statement in *Metropolitan Parking Inc.* as cited in *Tatham Company* and quoted by the majority at paragraph 20 of their decision. I would simply emphasize that "essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided."
5. In the excerpts from *Tatham Company* and *Culverhouse Foods*, both found at paragraph 20 of the majority, it is clear that a decision pursuant to section 64 is often complex and, while being mindful of the purpose section 64 was meant to achieve, the decision must be mindful as well of the business context in which the transaction occurs.
6. In *Sunnybrook Food Market (Keele) Limited*, [1974] OLRB Rep. Jan.47, a purchaser bought some assets of a closed food retailer, leased the same premises, and carried on a food retail business. The Board drew the distinction between the purchaser leasing from the landlord as a third party and the assignment of the lease from the seller, or the purchaser becoming the tenant of the vendor or purchasing the real property with the assets. In *Sunnybrook* the Board found no sale had occurred within the meaning of section 47A (now section 64). In all three of the distinguished cases the Board had found a sale had taken place within the meaning of the Act. In the case before us there has been an assignment of the lease, albeit with differing terms. However, a further distinction was that in the case involving an assignment of the lease, *Kitchener Food Market* (unreported), the entire transaction was contingent on the approval of the assignment of the lease.
7. In this case the lease was incidental to the purchase of the corrugator. As the majority noted in paragraph 8 of their decision "Moore wanted *either* an acceptable lease assignment *or* a price adjustment to accommodate the cost of removing the corrugator to Specialized's Barrie plant". This indicates that Moore's purpose was to purchase the corrugator and not to purchase or carry on the "business" of Paperboard Industries Corporation.

8. John Kent was the plant manager for Paperboard at the Holland Landing site. Moore approached him about working for Specialized if it completed an agreement for the purchase of the corrugator and assignment of the lease. Kent's employment with Specialized was dependent on an assignment of the lease. The purchase of the corrugator was not dependent on an assignment of the lease, this was merely one option. Moore originally intended to hire the plant manager of Independent Corrugators to manage the plant. The fact is that Kent made the initial approach to Moore about working for him. When it appeared that Moore would receive an assignment of the lease he determined to hire Kent because of his intimate knowledge of the equipment and in particular of the idiosyncrasies of the site. It was Kent who assumed responsibility for having the corrugator in operation and for hiring employees. Naturally Kent hired some of the employees who had previously worked under him for Paperboard Industries. He hired those who in his opinion had the knowledge and experience necessary for the new organization. It is significant that the employees hired, while still engaged in production of corrugate sheet, were not necessarily performing in the same positions nor the same fashion as they had for Paperboard.

9. As the majority acknowledged at paragraph 24 the fact that Specialized supplies some of the same customers as were supplied by Paperboard is due to the price sensitivity and the absence of loyalty to a particular supplier. It is also partially due to the box manufacturing industry being a small and highly specialized one. Most of the manufacturers obtain their corrugated sheet from the same suppliers of which there are a limited number. The customer base supplied by Moore was in no way the result of it having received any introduction to them, any accounts receivable, finished inventory, patents, trademarks or logos from Paperboard Industries. Indeed, Paperboard Industries continues to manufacture corrugated sheet and supply some of the same market from its plant in Mississauga. It is worth noting that Moore produces in the order of 17 million square feet per month of corrugated sheet at the Holland landing site. The majority of this is for its own use, something less than twenty-five percent of production is sold on the market.

10. All of this indicates that Specialized set out to acquire a corrugator to supply its own converter plant which had previously been supplied by Independent Corrugators in which Specialized had held a 25 percent interest. This is what it achieved. Specialized and its sister company Innovative, both owned by Moore, were merged and together with the corrugator site at Holland Landing comprise Moore Packaging Corporation. Moore now had a secure and adequate supply of corrugated sheet for its production facilities which had previously been supplied through Moore's one quarter interest in Independent Corrugators. The supply of corrugated sheet to the open market, while not insignificant, was a minor part of Moore's business. Supplying corrugated sheet to the open market had been part of Paperboard's business at the Holland Landing site. Paperboard also produced corrugated sheet for its own needs and the open market at its site in Mississauga. This is another indication that Specialized, now Moore Packaging, did not take over nor was involved in the continuation of Paperboard's business at the Holland Landing site.

11. For all of these reasons I would dissent from the findings of the majority, decline to make the declaration set out in paragraph 24(2) and dismiss this application.

3664-91-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Riverside Fabricating Limited**, Respondent v. Group of Employees, Objectors

Certification - Charges - Petition - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

APPEARANCES: *L. N. Gottheil*, *Dan Flynn* and *Brian Kunkel* for the applicant; *Theodore Crljenica* and *Dennis Anglin* for the respondent; *David Wylupek* and *Aaron MacPherson* for the objectors.

DECISION OF THE BOARD; August 21, 1992

I

1. The name of the respondent is amended to read: "Riverside Fabricating Limited".
2. This is an application for certification.
3. There is no dispute and the Board finds that this application is timely, and that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that the unit of employees appropriate for collective bargaining should be described as follows:

all employees of Riverside Fabricating Limited in the City of Windsor, save and except supervisors/foreman, persons above the rank of supervisor/foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

5. A hearing in this matter was held in Windsor, Ontario on June 24, 25, 26, 29, and 30. Counsel for the parties agreed that the Board should deal first with the evidence confirming the employees' continuing wish to be represented by the union, then turn to the allegations of misconduct brought by certain objecting employees. The parties agreed that if these issues were disposed of in the union's favour, the union could be "certifiable" and it would be unnecessary to inquire into either the "voluntariness" of the statement submitted by the objecting employees, or the union's allegations of misconduct against the employer.

II

6. Before turning to the evidence, it may be useful to briefly sketch in the legal framework within which the parties' rights must be determined. The provisions of the *Labour Relations Act* and the *Rules* to which reference will be made are as follows:

[Certification with or without a representation vote]

- 7.-(1) Upon an application for certification, the Board shall ascertain the number of employees

in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at the time as is determined under clause 105(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of the employees are members of the trade union, the Board may direct that a representation vote be taken.

* * *

[Definition of union membership]

1.-(1) In this Act,

“member”, when used with reference to a trade union, includes a person who,

- (a) has applied for membership in the trade union, and
- (b) has paid to the trade union on the member's own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” has a corresponding meaning;

* * *

[Presentation of membership evidence and objections to the Board]

105.-(2)(j) ... the Board has the power to determine the form in which and the time as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined;

* * *

[Secrecy of union membership and employee wishes]

113.-(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

* * *

[Evidence of membership or employee objections must be in writing]

Rule 73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and

- (ii) the name of the employer; and
- (b) is filed not later than the terminal date for the application.

[No oral evidence of membership or objection]

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

(3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection (1) not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.

(4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing or, in the case of an application to which sections 87 to 99 apply, at any hearing directed by the Board, in person or by a representative.

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

III

7. The system of certification prescribed in the *Labour Relations Act* rests upon an assessment of the union's level of membership support which, in turn, is based upon an examination of the union's *documentary* evidence of membership. Upon showing the requisite level of membership support, the union is "certified", or granted a "licence to bargain" on behalf of a group of employees. If the union is able to demonstrate the support of a clear majority of the employees in the bargaining unit (i.e. more than 55%), it may be certified without recourse to a representation vote. If the level of support is below forty-five percent the application is dismissed. In the middle range - forty-five percent to fifty-five percent - a representation vote is mandatory.

8. On an application for certification the Board does not receive or rely upon *oral* evidence about employee wishes (see Rule 73(2)). The Board's determination is made on the basis of *documentary* evidence of membership; moreover the term "member" has a special statutory definition: someone who has signed a union membership card and paid at least one dollar in respect of union membership dues. If an employee becomes a "member" of the union within the meaning of section 1(1) of the Act, his/her membership document is "counted" for the purposes of section 7(2). If someone does not sign a union membership card s/he is presumed not to support the union's certification.

9. In this jurisdiction a representation vote is not the primary vehicle by which a union achieves the right to represent employees. Representation votes are a residual mechanism which is triggered when the union cannot demonstrate that a "clear majority" of employees support it (i.e. more than fifty-five percent of the employees in the bargaining unit are "members" of the union),

or where the Board, in its discretion, considers that a representation vote should be held in the circumstances of a particular case. One such circumstance is a voluntary change of heart by employees who have previously signed union membership cards. If a sufficient number of union “members” (as defined in section 1(1)) later indicate in writing that they no longer wish to support the union’s bid for certification, the Board may direct a representation vote to resolve these contrary indications of employee wishes. Likewise, if the union’s membership evidence is defective or unreliable, the Board may seek the confirmatory evidence of a representation vote (or may dismiss the application altogether).

10. In accordance with section 113 [formerly 111] of the Act, the Board’s review of the evidence will not disclose the wishes of particular employees with respect to trade union representation unless those employees volunteered that information in the course of the hearing.

IV

11. The respondent employer operates a small manufacturing business in Windsor. It has a total work force of about one hundred employees, of whom about three quarters are in the agreed bargaining unit. A large number of those employees are of Vietnamese origin.

12. In early February, 1992 the union began an organizing campaign among the respondent employees. It was, in fact, the second such campaign in recent years. An earlier certification application was dismissed, following a representation vote. As before, the current campaign consisted of efforts to persuade employees to sign membership cards authorizing the union to represent them. The vast majority of those union membership cards (48 of the 51 eventually submitted) were signed prior to February 14, 1992.

13. In support of this application for certification the trade union eventually filed documentary evidence of membership on behalf of more than fifty-five percent of the employees in the above-described bargaining unit. As we have already mentioned this documentary evidence took the form of membership cards. Each card is a combination application for membership and an attached receipt. Each card is signed by the employee, and the receipt is counter-signed by a witness (“the collector”). Each card indicates that a payment of not less than one dollar has been made to the union in respect of its initiation fees. The one dollar payment is in the nature of consideration and confirms that act of signing.

14. This documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration attesting to its regularity and sufficiency; moreover the form of this evidence meets the requirements of section 1 of the Act, and the time limits prescribed pursuant to section 105(2)(j) [formerly 103(2)(j)] of the Act. All of the cards were received by the Board prior to the terminal date.

15. This documentary evidence, on its face, demonstrates that the union has a level of “membership support” well in excess of that required by section 7(2) of the Act for certification without recourse to a representation vote.

16. There was also filed with the Board a “Petition” signed by a number of employees, and indicating that they wish to oppose the union’s certification. This petition includes the names of a small number of individuals who had previously signed union membership cards. These union “members” had allegedly had a change of heart after signing their membership cards, and now purportedly no longer wish to support the union’s certification.

17. Finally, to complete the documentary picture, the union has filed what we will refer to

as a “reaffirmation document”. This document is also in petition form, and is signed by a large number of employees. It has the following heading:

“We, the undersigned, hereby revoke our signatures on the Petition against the CAW and reaffirm our membership in the CAW and our desire to have the CAW represent us as our Bargaining Agent”.

Since this document was signed *after* the anti-union petition, it would, if otherwise voluntary, negate or reduce the impact of that petition, because some of the union members whose wishes might otherwise have been in doubt by reason of their signing the anti-union petition, have subsequently clarified their position by signing the reaffirmation document, revoking their signatures from the petition, and confirming their support for the CAW.

18. In summary, then, the Board had before it documentary evidence of membership from which it could conclude that the union was entitled to certification, together with a signed reaffirmation document from the employees confirming their continued support for the union despite an earlier petition which might suggest otherwise. It was evident, therefore, that unless the respondent or the objectors were able to establish that these union documents were unreliable, the Board *could* certify the union on the basis of the documentary evidence of membership before it. The Board need not hold a representation vote, even though quite a number of employees are clearly opposed to trade union representation.

19. It is important to note, however, that no employee who has signed a union membership card has raised any allegation or complaint about the manner in which his/her signature was obtained. In particular, no employee who has signed a membership card has raised any allegation of threats, intimidation, misrepresentation or anything else that would call into question the “voluntariness” of this documentary demonstration of union support; nor has any such employee asserted that s/he did not know that s/he was signing. No employee who has signed a membership card suggests that his/her card is not a reliable indication that s/he wants to be represented by the applicant union.

20. The same observations can be made about the “reaffirmation document”, confirming the employees’ support for the CAW. No employee who has signed the reaffirmation document has raised any question about the manner in which his/her signature was obtained. In particular, no employee who has signed the reaffirmation document has raised any allegation of threats, intimidation, misrepresentation, or anything else that would call into question the “voluntariness” of their individual acts of signing; nor has any such employee asserted that s/he did not know what s/he was signing. No employee who has signed the reaffirmation document questions its reliability as a confirmation of support for the union.

21. In short, none of the employees who became union members or support the union’s certification raise any challenge to the documentary evidence that records their support. However, those allegations *are* made by employees who have *not* signed membership cards and it is those allegations which we will consider below.

22. In accordance with the agreement of the parties, we will briefly consider the origination and circulation of the reaffirmation document. We will then turn to the objectors’ charges of misconduct.

The Circulation of the Reaffirmation Document

23. The above-mentioned reaffirmation document was drafted by an official of the union and circulated on February 25 and February 26, 1992 - that is, after the anti-union petition, but

prior to the terminal date fixed by the Board pursuant to section 105(2)(j). The signatures on the reaffirmation document are all witnessed. The document also specifies the date, time and place that the signatures were obtained.

24. The Board heard extensive evidence about the manner in which each of the signatures was collected; however, we do not think that it is necessary to recount that evidence here. It suffices to say that the solicitation generally took place either in employees' homes, or at the company premises before work, after work, or during breaks. In each case the employee was asked to read the document and affix his/her signature if s/he wanted to confirm support for the union.

25. Employees were not asked whether they had signed the anti-union petition (although a few had). They were merely asked to confirm their support for the union. The union adherents approached fellow employees who had earlier signed membership cards, and asked them to confirm their support for the CAW.

26. We are satisfied on the basis of the evidence before us that the reaffirmation document represents the voluntary wishes of those who signed it. There is nothing in the evidence to establish otherwise. In the case of those who had earlier signed the anti-union petition, the reaffirmation document represents a repudiation of their purported opposition to the union - a repudiation which was voluntarily recorded *after* they signed the petition, and *before* the terminal date. For the most part, those union members who (for whatever reason) signed the anti-union petition, have later repudiated that petition and reaffirmed their support for the union's certification.

27. In so finding, we do not doubt that there may remain considerable opposition to the trade union. It is acknowledged that the work force is "split", with a vocal group of employees in favour of trade union representation, and a vocal group opposed. The debate has produced animosity and bitterness between the two "sides". There is even evidence that one union supporter had his car damaged by someone with a contrary opinion. But there is no evidence connecting such incidents to the circulation of the confirmation document, nor any assertion by anyone who signed it that they were improperly influenced to do so.

The charges

28. It will be convenient to deal with the charges one by one. We must determine whether the evidence establishes impropriety, whether it reflects upon and undermines the union's documentary evidence of support, and whether, in all the circumstances, a representation vote should be directed

* * *

29. Ann Hirst and Ron Grundy are opposed to trade union representation. They claim that they were harassed by Brian Kunkel because of their anti-union views. Kunkel is admittedly a vocal supporter of the union. However, since Hirst and Grundy did not sign a membership card or the confirmation document, their charges do not impact *directly* on the documentary evidence signed by union supporters. Nevertheless, we are asked to infer from their experience that "harassment" was sufficiently wide spread that the Board should discount the evidence from the union's supporters, or direct the taking of a representation vote.

* * *

30. Ms. Hirst claims that her "job security" was "threatened" by Mr. Kunkel, who

harassed her on a number of occasions because she did not support the union. The evidence does not support that allegation.

31. On several occasions Kunkel told Hirst that if the union was successful, she would no longer be the beneficiary of what Mr. Kunkel regarded as company favouritism. Kunkel told her that "easy jobs", of the kind Ms. Hirst was accustomed to perform, would be allocated on the basis of seniority and ability. Once the employees were represented by a union, the company would no longer be able to "play favourites" as in Kunkel's opinion it was doing with Ms. Hirst.

32. These comments no doubt annoyed Ms. Hirst who complained to a supervisor and asked to work in another area. Ms. Hirst no doubt considered Kunkel's comments unfair and unwarranted. She was angry at Kunkel's suggestions, and perhaps concerned that a system based on seniority would alter the distribution of work in the plant. But there is nothing menacing in these remarks, nor can they realistically be considered an improper "threat" to Ms. Hirst's "job security" - which, of course, Kunkel could not influence. An assertion that collective bargaining would remove favouritism may be distressing to persons identified (rightly or wrongly) as the beneficiaries of such favouritism; however, we cannot characterize such comments as intimidation or coercion.

33. In any event, there is nothing in Ms. Hirst's allegations which persuades the Board to question or discount the documentary evidence signed by the union's supporters.

* * *

34. Mr. Grundy complains that he was subjected to threats to damage his car. The evidence does not support that allegation either.

35. In or around February 20-22 the objecting employees began circulating their petition in opposition to the union, and urging employees to sign it. During that period, someone damaged the vehicle of a union supporter, who had refused to sign the petition. Brian Kunkel concluded that the source of that damage was the union's opponents, and he did not hesitate to say so. In the employees' lunch room he loudly exclaimed "do you believe those people [the union opponents] would actually break someone's car if they didn't sign the petition". He said to Grundy: "how would you like it if your car was kicked in".

36. Grundy was upset that he was being associated with the vandals, but there was no threat to Grundy himself, or to his vehicle. The rueful comments from Kunkel were part an increasingly angry interchange between union supporters and opponents, including, we might note, Grundy's reply to Kunkel that the president of the company should fire all of the union supporters. Kunkel's question was rhetorical. It was not a threat.

* * *

37. Kevin Coons complains that, during the lunch break on February 22 Brian Kunkel was heard to say that he knew a petition was being circulated and that if employees signed the petition he (Kunkel) would find out about it at the Labour Board hearing. The objectors argue that this was likely to make employees fearful about signing the petition and that therefore the Board should order a representation vote.

38. That is not what Kunkel said. Kunkel did discuss the petition, and did indicate that if a petition was filed, the union supporters would find out *how many* persons had signed it. But this comment (which is perfectly true) was made in the context of a discussion about the Board's "No-

tice to Employees” that was posted in the workplace and includes these excerpts from the Board’s laymen’s “Guide to the *Labour Relations Act*”:

What is the terminal date?

The terminal date is set by the Board. It is normally seven to ten days following the date the application for certification was received. *This is the date by which the trade union applying for certification must file its membership evidence and interested employees must file any documents expressing opposition to certification of the trade union or revoking that opposition.* Material sent by registered mail on or before the terminal date is considered to have been filed as of the date of mailing. Otherwise documents are filed when they are received by the Board.

If documents opposing the union or indicating an employee no longer wishes to oppose the union are not received by the Board by the terminal date or sent by registered mail to the Board by that date, the Board generally refuses to consider them.

Evidence of employee wishes is kept confidential by the Board.

* * *

Can an employer suggest that employees file a document opposing the union or assist in its preparation?

The Board will disregard any such document that is not clearly a voluntary expression of the signing employee or employees and is not entirely free from actual or perceived employer influence.

Documents recording employee opposition to certification of a union are often referred to as “petitions” in proceedings before the Board. There is no standard form. Whatever form the document takes, it must be signed by the employee or group of employees concerned. As a minimum, the document must name the employer and union involved and state clearly that the employee or employees who have signed it are opposed to the applicant union being certified.

Kunkel’s remarks were made in the context of a general discussion of this notice and the Board’s approach to anti-union petitions.

39. We are satisfied that Mr. Kunkel never made the comments attributed to him and prefer his evidence over that of Mr. Coons in this regard. We also note Mr. Coons’ testimony that he was quite nonchalant about the whole thing because he knew that the trade union could not learn the precise identity of the union opponents. That is what the notice said.

40. There was no “threat”, and there is nothing in this evidence which casts any doubt on the documentary material submitted by the union.

* * *

41. Randy Last complains that, while in attendance at a union meeting on Sunday February 23, 1992, he was threatened by Glen Bennett when he sought to raise a question with a union representative. Last claims he was told that if he did not sit down he would be taken outside and beaten up.

42. Mr. Last is not a union supporter and did not sign any of the documents upon which the union relies. Mr. Bennett is a rank and file employee, like Mr. Last. Mr. Bennett has no official role in the trade union, nor was he active in the union’s organizing campaign, which by that time was all but completed.

43. Nor was the incident precisely as Mr. Last described it.

44. The incident of which Mr. Last complains occurred at a union meeting where supporters and opponents were invited to air their concerns. In the course of that meeting there was a brief interchange between Mr. Last and Mr. Bennett. Mr. Last asserted that on some earlier occasion he had been able to redress a wrongful discharge without the assistance of a union. He said that he wasn't persuaded a union was necessary to protect employee rights. Employees could look after themselves.

45. Mr. Bennett replied that it must have cost a lot of money to accomplish that result. Bennett was sceptical about Last's claim.

46. Last referred to Bennett as a "big guy shooting his mouth off" (or words to that effect). Bennett responded that he was "big enough" to fix Last outside (or words to that effect). But at this point Dan Flynn who was chairing the meeting intervened to end the cross talk and nothing came of the incident. There was no physical altercation then or later. Things quieted down and the meeting continued. Last remained at the meeting, and after it was over pursued his questions with Flynn.

47. There is no reason to infer from this angry interchange that the union's evidence (most if which was collected earlier) is unreliable. Nor is it reason to direct a representation vote.

* * *

48. It is further alleged that Dan Dumouchelle overheard Brian Kunkel threatening Thanh Trung Nguyen with respect to his non-support of the union. Mr. Dumouchelle says he took these threats to include "death threats".

49. The evidence does not support these allegations.

50. Mr. Dumouchelle testified that sometime in February (he was not sure of the date) he had occasion to be in the plant, making a delivery. He was about thirty feet away from the area known as "line six". That area of the plant is very noisy. Employees are required to wear ear protection.

51. Mr. Dumouchelle testified that he was standing outside the shipping office preoccupied with his own tasks and waiting for goods to be loaded, when he heard the word "union". As he turned around, looking towards line six, he heard the words "kill you", and observed a Vietnamese person whom he did not know but who appeared to Mr. Dumouchelle to be upset. Mr. Dumouchelle said he saw the employee's face for a moment, just as the employee was bending or reaching down to pick up his jacket, before turning around to walk (away from Dumouchelle) towards the lunchroom. These remarks were attributed to Brian Kunkel who works on line six.

52. Mr. Dumouchelle did not think much of the incident at the time, nor did he raise any concerns about these alleged "death threats". The matter only surfaced some weeks later, in conversation with Ann Hirst who belongs to Mr. Dumouchelle's bowling league. It was during this conversation that Kunkel's name arose and was associated with the alleged threats.

53. No oriental employee has complained of any threat nor does any employee support the assertion that a threat was made in this instance. The objectors did not call the alleged victim or any of the other line 6 employees who were there at the time and in a better position to hear than Mr. Dumouchelle.

54. Mr. Kunkel denies any threat of any kind.

55. In the circumstances we prefer Mr. Kunkel's evidence over that of Mr. Dumouchelle. There is no question of Mr. Dumouchelle's credibility, but we are not prepared to find or infer a "death threat" from some disconnected words heard across a noisy factory, or from Mr. Dumouchelle's momentary assessment of the facial expression of some oriental stranger.

* * *

56. The objecting employees called no evidence with respect to the allegations contained in paragraph 3 and 7 of their counsel's letter of March 19, 1992. There is therefore no basis for making any finding in respect of those allegations. We note, though, that to the extent that they involve alleged threats against Phat Tan Luong the failure to call the witness mentioned in counsel's letter (who, it was said, overheard the threats and actually intervened on Phat's behalf), leaves the Board with the difficult task of assessing the evidence of Phat Tan Luong himself. And Phat Tan Luong absolutely denies any threat.

* * *

57. Mr. Phat's evidence deserves separate consideration, and for ease of reference, we will refer to him (as did counsel and the other witnesses) by his nickname "Danny". We should note at the outset, however, that by the time of the alleged threats against Danny, virtually all of the union membership cards had been collected, and the signatures on the reaffirmation document were not collected until some day's later. Thus, whether or not Danny himself supported the union, nothing touches the union's *other* documentary evidence of support, unless we are prepared to infer that it is somehow "tainted" by what may have been said to Danny. In other words, we must find not only that Danny was in fact threatened, but also that the threat taints both the union membership evidence that was collected from other employees a week or two earlier, as well as the reaffirmation document that was circulated about a week later. And we repeat: none of the employees - including Danny - has asserted that these documents are unreliable or were improperly obtained. None of the union's nominal supporters has raised any impropriety.

58. The allegation is that on February 18 and February 20 two employees threatened Danny. There is no eye witness evidence of such threat. No one says s/he saw it. No one says s/he heard it. The testimony is indirect, incomplete, and very contradictory.

* * *

59. According to Dennis Anglin, the company Vice-President, Danny approached him some days before February 22nd, and complained that he was being threatened by fellow workers of Vietnamese origin. The complaint and conversation were in English.

60. Mr. Anglin agreed that Danny's English is not very good, that it takes time to discern what Danny means, and that it is important to "look him in the eye" and "initiate a response". Mr. Anglin said that it was often necessary to ask Danny a question a number of times in order to make sure that Danny understood what was being said to him. Nevertheless, Mr. Anglin was sure that, on this occasion, Danny had complained of being afraid that others would give him a hard time if he did not support the union; moreover, according to Mr. Anglin, *Danny himself* specifically mentioned the names of the two Vietnamese coworkers who, he said, were threatening him about signing something "for the union".

61. However, later in his evidence Mr. Anglin indicated that he wasn't sure exactly how the names came up, nor was he sure of precisely what Danny had said on that occasion. Mr. Anglin testified that Danny did not mention any damage or threat of damage to his car. Mr. Anglin only

found out about that later. And Mr. Anglin was certain that Danny never said he wanted to stay “neutral” or that he was worried that someone might make him choose sides.

62. The problem is, that at about this time, the union opponents were approaching employees to sign their anti-union petition, and as we have already mentioned, a *union supporter's* car was damaged. That is the incident that Kunkel complained about in the lunchroom, angering Grundy who believed himself unfairly accused. Most of the actual “signing” and solicitation that was going on at the time of the alleged threats to Danny, had to do with the anti-union petition. By this point the union’s membership drive was substantially over, and its reaffirmation campaign was yet to come.

63. This is not to say that the alleged threats did not occur or could not have occurred. It is simply that, in this context, it is exceptionally difficult to make any inferences about the source of any improper pressure, or to distinguish fear from fact. For example, it is possible that: union supporters pressured Danny to sign a membership card; union supporters pressured Danny *not* to sign the petition; union opponents pressured Danny *not* to sign a union card or support the union; union opponents pressured Danny to sign the anti-union petition; there was no actual pressure from anyone, but Danny may have been apprehensive about the situation, yet unable to accurately identify or communicate the source of his concerns.

64. The whole situation is fraught with ambiguity and the potential for misunderstanding.

65. Danny himself was a reluctant and unsatisfactory witness, who gave his evidence through an interpreter. He was antagonistic and unresponsive to both counsel for the objectors (by whom he had been subpoenaed) and counsel for the employer; and he was obviously very disturbed at being questioned in a public forum.

66. Danny repeatedly stated that he wanted to stay neutral, and answered questions only grudgingly. He was clearly loath to provide any support for the allegations that had brought him unwillingly to the Board, and was at pains not to show his support for either side. He said (and this we accept) that he didn’t want anyone to give him trouble. All he wanted was to be left alone.

67. Danny’s version of events was quite different from that of Mr. Anglin.

68. Danny testified that he approached Mr. Anglin in order to assure him (Anglin) that he was neutral. He told the Board that some employees were in favour of the union while others were opposed, and he was concerned that the “customs” of the latter were different, and that he might be misunderstood. This could only be a reference to the objectors, who were not of Vietnamese origin and (we were told) were having no success recruiting Vietnamese workers to their cause. The Vietnamese workers were solidly “pro-union”. Indeed when Ann Hirst suggested at a union meeting that these employees didn’t understand what they were doing, she was shouted down with the angry exclamation “what do you think we are, stupid?” Danny’s reference to persons with different customs who might misunderstand fits the profile of anti-union petitioners, rather than a fellow worker of Vietnamese origin.

69. Danny flatly denied that the two named individuals had threatened him or were trying to force him to join the union. He was worried that he might be forced to sign “a paper”, but maintained that, in fact, no one forced him to sign anything. He wasn’t clear what “the paper” was all about, and the document in question might well have been the anti-union petition.

70. Danny acknowledges telling Mr. Anglin that he did not want anyone to give him a hard time but he specifically denied any threat from his Vietnamese co-workers and he further denied

identifying those workers to Mr. Anglin. He said he approached Mr. Anglin because he wanted to assure Mr. Anglin that he was neutral - as he repeatedly told the Board. He told the Board that he was afraid of *everyone* - by which we take him to mean that he was concerned that anyone would find out which way he leaned.

71. Danny denied that he had volunteered the names of his Vietnamese co-workers, or otherwise singled out these two employees. According to Danny, he made a non-committal response to Mr. Anglin's suggestion that "it's these two, right?". Danny maintained that he was not afraid of giving evidence but, by the same token, he was concerned that his position might be misunderstood by fellow employees. Danny was not prepared to attribute the damage to his car to any of the factions in the plant.

72. What is to be made of this conflicting evidence? Clearly there was an interchange of some kind between Mr. Anglin and Danny with respect to his apprehension about what was going on around him at the time. In the course of that interchange we are satisfied that the names of two other employees surfaced. However, we are not persuaded that Danny himself identified those two individuals or complained that he had been threatened by them. Having considered Danny's demeanour when giving his evidence, his facility with the English language, his reluctance to identify himself with any factions, the disingenuous way he responded to the respondent's cross-examination, and his express denial of any threat from the named individuals, we are simply not prepared to conclude that those threats were made.

73. Danny was concerned that he might be induced to sign some document which, if disclosed, might be "misunderstood" or might identify him with one of the contending factions in the plant; and he was still concerned about that when he gave his evidence - particularly in his cross-examination by counsel for the respondent. He was, in short, worried about precisely the kind of disclosure which is protected by section 113 of the Act. However we do not think that the evidence when viewed as a whole establishes the threat to which the objectors' allegations refer, nor does the evidence concerning Danny undermine the overall reliability of the union's documentary evidence of support.

74. We do not think it is appropriate to record whether or not Danny himself signed a membership card or the reaffirmation document, and, if so when, at whose request, and in whose presence. This information is protected by section 113 of the Act. We can say that the documentary material does not support the result urged upon us by the objectors and the respondent.

75. There is one final point which needs to be addressed. It was suggested in argument that the Board should draw some inference from the fact that the employees of Vietnamese origin overwhelmingly supported the union and resisted the efforts of the objectors to persuade them to the contrary view. It was suggested, (albeit vaguely), that this communal consensus supported the objectors' claim of intimidation. Such unanimity it was argued, supported the inference of coercive peer pressure.

76. We draw no such inference. The substantial support which the union obtained from these employees no doubt reflects a sense of communal solidarity, but we are not prepared to conclude that these employees were intimidated, coerced, or otherwise improperly influenced. If block voting by ethnic or interest groups was considered evidence of impropriety, there are few elections which could not be challenged. Nor are we prepared to find (as union opponents suggested at one of the organizing meetings) that these individuals did not know what they were signing. On the contrary. Not only has no employee of Vietnamese origin indicated any misunderstanding or misrepresentation, but the evidence we do have indicates that, where necessary,

employees translated for each other. And at the risk of being unduly obvious, we note that the language of the work place is English.

77. For the foregoing reasons, we are not prepared to conclude on the evidence before us, that there has been any improper or irregular conduct which calls into question or undermines the union's documentary evidence of support. Even assuming, without finding, that the anti-union petition represents the voluntary wishes of those who signed it, at the time that they signed it, most of the wavering union members subsequently and freely signed the document repudiating that petition and confirming their support for the trade union. To put the matter another way: assuming, without finding, that some union members were having second thoughts and therefore signed the anti-union petition, we find that after further reflection they voluntarily reaffirmed their support for the union's certification. It is unnecessary to consider whether the anti-union petition is, in fact, voluntary. Nor is it necessary to consider the union's allegations against the respondent.

78. We find that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 27, 1992, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

79. Having considered the totality of the evidence, the Board is not persuaded to exercise its discretion to direct that a representation vote be taken.

80. A certificate will issue to the applicant, in respect of the agreed bargaining unit defined at paragraph 4 above.

1012-92-U Graham Johnson, O.P.S.E.U., Complainants v. Township of Lake of Bays, Respondent

Practice and Procedure - Unfair Labour Practice - Board directing pre-hearing filing of respondent employer's reply to union's unfair labour practice complaint, as well as disclosure of documents - Union directed to fully particularize complaint and to supply employer with documents upon which it intends to rely - Both parties directed to indicate number of witnesses to be called and estimated number of hearing days required - Board directing pre-hearing conference with parties and counsel

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Rundle* and *J. Redshaw*.

DECISION OF THE BOARD; August 13, 1992

1. This is a complaint under section 91 [formerly 89] of the Act alleging that the respondent employer, through its officials, has contravened a variety of the unfair labour practice provisions of the Act. The details of that complaint need not be set out here. It suffices to say that, in the union's submission, the cumulative effect of the employer's conduct is to penalize a union supporter and interfere with the employees' right to trade union representation.

2. This complaint was filed on June 30, 1992. As of the date hereof, the respondent

employer has filed no reply; that is, there is no response to the union's complaint, no explanation for the allegedly unlawful conduct and no statement of facts upon which the employer intends to rely when this matter comes on for hearing. It might be noted that pursuant to section 91(5) of the Act the employer has the legal onus to establish that the conduct complained of did not contravene the Act.

3. Having regard to the foregoing, the Board hereby directs that the respondent employer file its Reply forthwith. Such Reply must specify all facts upon which the employer intends to rely in responding to this complaint. In addition, the employer must identify, and provide to the complainant union all documents upon which the employer intends to rely or to which it will refer in this proceeding. Similarly, the complainants are directed to fully particularize all facts upon which they intend to rely, if they have not already done so, and to supply to the respondent and the Board all documents upon which they intend to rely.

4. Finally, *both parties* are directed to indicate to the Board and each other the number of witnesses that they intend to call and their estimate of the total number of hearing days required to litigate this matter.

5. Given the current state of the pleadings, the Board is not prepared to set this matter down for hearing immediately. However, in our opinion a pre-hearing conference might well be useful to explore (and potentially narrow) the issues in dispute. Accordingly, the Board directs and hereby notifies the parties that a pre-hearing conference in this matter will be held on September 15, 1992 at 9:30 a.m., at the Board's offices, 400 University Avenue, Toronto, on the 6th Floor. The parties should appear at that time with the counsel who will be representing them if this matter goes on for formal hearing. Following the completion of the pre-hearing conference, the Board will set this matter down for hearing, as necessary, setting aside the number of days which appear to be appropriate.

0334-92-R; 0335-92-R Donald Feener, Applicant v. Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562, Respondents v. **Walden Roofing & Sheet Metal Co. Limited**, Intervener; John Jordan, Applicant v. Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562, Respondents v. Walden Roofing & Sheet Metal Co. Limited, Intervener.

Construction Industry - Representation Vote - Termination - Board applying reasoning of Crete Flooring Group decision to termination representation votes in construction industry - Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date

BEFORE: Bram Herlich, Vice-Chair, and Board Members W. A. Correll and B. L. Armstrong.

APPEARANCES: *Ian S. Campbell, Steven Gadbois, Donald Feener and John Jordan* for the applicants; *J. Raso and Cliff Coffin* for the respondents; no one appearing for the intervenor.

DECISION OF THE BOARD; August 24, 1992

1. The name of the respondents in both files is hereby amended to read: "Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562" (to whom we shall refer as the "union").

2. These are applications pursuant to section 58 of the *Labour Relations Act* for a declaration that the union no longer represents employees.

3. As the two files involve different bargaining units of employees of the same employer heretofore represented by the same trade union, the parties agreed that the matters be heard together.

4. Board File 0334-92-R concerns a bargaining unit composed of:

all journeyman sheet metal workers and registered sheet metal apprentices in the employ of Walden Roofing & Sheet Metal Co. Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

5. For ease of reference we shall henceforward refer to this bargaining unit as the "sheet metal unit".

6. Board file 0335-92-R concerns a bargaining unit composed of:

all employees of Walden Roofing and Sheet Metal Co. Limited performing work covered by the terms and conditions of this agreement in the commercial, industrial and institutional sectors and new high-rise structures in all other sectors, except the work covered in the collective agreement of the Electrical Power Systems Construction Association and the union, of the construction industry in all geographic areas in the Province of Ontario.

7. The agreement first referred to in the above bargaining unit description is the collective agreement between The Labour Relations Section of the Ontario Industrial Roofing Contractors' Association on the one hand and The Built-Up Roofers Damp & Waterproofing Section of the Ontario Sheet Metal Workers' & Roofers' Conference of the Sheet Metal Workers' International Association on behalf of the following affiliated bargaining agents:

(a) Local Unions 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562.

(b) The Sheet Metal Workers' International Union

on the other hand. For ease of reference we shall henceforward refer to this bargaining unit as the "roofers' unit".

8. The parties agreed and the Board finds that the bargaining units concerned are those just described and that the present applications are timely having regard to section 58(2) of the Act.

9. The parties were also agreed that in each case the applicant has filed material indicating

that not less than forty-five percent of the employees in the respective bargaining unit have signified in writing that they no longer wish to be represented by the respondents.

10. The only issue in these matters is whether the documents filed in support of the applications represent the *voluntary* wishes of the signatory employees.

11. The parties were able to call all their evidence on the day of hearing scheduled for these matters. We heard the evidence of the two applicants and of Cliff Coffin, business manager of Local 562. Rather than convene for a further hearing day simply to hear argument, the parties agreed to file written argument with the Board.

12. As the facts are largely not in dispute it is unnecessary for us to recount them in intricate detail.

13. Sometime in the fall of 1991 and as a result of his concerns about the employer's competitive position in a difficult economic climate, Mr. Feener took steps which resulted in a meeting attended by Mr. Feener, Mr. Thistle, an employee in the roofers' unit, Mr. Coffin, business manager of Local 562 and principals of the company. At this meeting Mr. Feener sought the union's agreement to certain concessions or exemptions from some requirements of the provincial agreement(s) in order to enhance the employer's competitive position. Mr. Coffin advised that he was unable to comply with the request.

14. Shortly afterwards, Mr. Feener sought legal advice regarding a possible termination application. He was advised, among other things, that such an application would not be timely until the two-month period ending April 30, 1992.

15. The possibility of a termination application was discussed by employees on various occasions over a period of time at informal gatherings at a local donut shop. Interest fluctuated.

16. Mr. Jordan, commencing in January, 1992, made various inquiries, was in touch with a number of counsel and ultimately retained counsel who represented the applicants at the hearing in this matter.

17. Statements of desire (petitions) were prepared by counsel. Mr. Jordan circulated a petition among employees in the roofers' unit; Mr. Feener did the same in the sheet metal unit. The petitions were delivered to counsel who, in turn, had them filed with the Board.

18. There was nothing remarkable about the manner in which the petitions were circulated and neither did the respondents claim any defect in that aspect of the application.

19. In advancing its contention that the applicants had failed to meet the onus of proving the voluntariness of the petitions, the respondents relied on what they asserted were Mr. Feener's close ties to management; contradictions, inconsistencies and lack of credibility in the applicants' evidence; and the significance of the economic climate.

20. We are satisfied that there were no significant contradictions or inconsistencies in the evidence of the applicants. The respondent's position in this regard related to what it claimed were disparities in evidence regarding whether or not Mr. Feener had attended one of the meetings at the donut shop and the specific date of a telephone conversation between the two applicants. Even assuming that the evidence of the applicants, is contradictory or inconsistent in this regard (something we do not find to be the case) the disparity in evidence does not strike us as one which is par-

ticularly significant or telling in the circumstances and would not cause us to doubt the balance of the applicants' evidence which was given in a direct, forthright and credible manner.

21. We are unable, however, to as easily dismiss the concerns raised about Mr. Feener's position. In this respect while both applicants are working foremen, Mr. Jordan testified that he performed no functions which would impact on the economic stability of bargaining unit employees. Specifically, he testified that he does not have supervisory authority to hire, lay off, discipline or dismiss. Neither does he do lay out nor decide how many and which employees would be used for a particular job. Mr. Feener, on the other hand, testified that he performed a number of functions with significant impact on employees' job security. In particular he acknowledged doing lay out, determining how many and which employees would be used on a particular job. He also acknowledged having a power of effective recommendation regarding hiring and layoff and agreed he was responsible for hiring the other two sheet metal unit employees.

22. This is not the first time the Board has had to deal with the consequences of the involvement of working foremen in the circulation of a petition. In *A. N. Shaw & Sons (Eastern) Ltd.*, [1980] OLRB Rep. Oct. 1347 the Board observed:

7. This then brings us to the issue of whether the statement of desire can be accepted as voluntary signification of those who signed it. The Board is always concerned that employees may have signed such a statement of desire out of the belief that it had the support of management and that management might become aware of any refusal on their part to sign it. It is worth noting at the outset that we are fully satisfied that there was no actual managerial involvement in either the preparation or circulation of the statement of desire. Notwithstanding the lack of any evidence indicating actual management involvement, counsel for the union contended that employees would likely have perceived that management was involved with the statement of desire because of the leading role played by Mr. Foley in its origination and circulation and the fact that Mr. Foley is employed as a working foreman.

8. Mr. Foley is a member of Local 200 who is paid an hourly rate pursuant to the terms of the collective agreement. He is regarded as a bargaining unit employee and does not exercise any managerial functions. However, as a working foreman, Mr. Foley does perform certain supervisory functions. He is responsible for assigning work to employees in his crew and also for pointing out to them any errors which they may have made. Mr. Foley makes reports to management on the work performance of other employees. Mr. Foley does not become directly involved in discussions relating to the hiring and firing of employees. However, it is reasonable to assume that his reports concerning employee work performance are taken into account by management when it considers its staffing requirements.

9. Mr. Foley and another employee, Mr. J. Shipperbottom, were the ones who originally decided to seek to terminate the union's bargaining rights. Although they first met as employees of the intervener, Mr. Foley and Mr. Shipperbottom are personal friends outside of the work place. According to Mr. Foley, the reason for the decision to seek to terminate the union's bargaining rights was the feeling that union representation acted to restrict the work opportunities available to the intervener's employees. Mr. Foley made particular reference to a job at Eatons' Bayshore in Ottawa. According to Mr. Foley, he and the intervener's other employees had been working at this job for some period of time when they were laid off for five to six weeks while employees of another firm were brought in to perform some sheet metal work. Mr. Foley indicated that he felt that he and the intervener's other employees could have performed this work themselves, and that to his mind the reason they were not asked to do so was because the work was not covered by their collective agreement. Mr. Foley testified that after he and Mr. Shipperbottom decided to seek to terminate the respondent's bargaining rights, they discussed the matter with the other employees and then retained the services of a lawyer who had recently acted on Mr. Shipperbottom's behalf in a real estate transaction. The lawyer prepared the statement of desire, which was later signed by the employees in the presence of both Mr. Foley and the lawyer.

10. In assessing the voluntariness of the statement of desire, we are unable to accept the propo-

sition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, *what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.*

11. Employees would have been well aware of Mr. Foley's supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting on behalf of management. To the contrary, his case in favour of terminating the respondent's bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been, and he blamed the existence of the collective agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

(emphasis added)

23. Highlighting the extent to which the inquiry will turn on the facts before it, the Board in subsequent cases has applied the same analysis and come to the opposite conclusion (see, for example, *Apex Services*, [1983] OLRB Rep. Jan. 1; and also *D-K Construction Ltd.*, [1991] OLRB Rep. May 609 where, but for other considerations, the Board might well have come to a result similar to that in the *A. N. Shaw* case).

24. Indeed, the facts before the Board in the present applications further underscore the point. Insofar as Mr. Jordan is concerned we are satisfied (and neither did the respondent argue to the contrary) that he would not have been viewed by other employees as acting on behalf of or with the support of management. On the other hand, we are unable to arrive at the same conclusion regarding Mr. Feener. While simply considering Mr. Feener's duties with respect to the sheet metal unit may have been sufficient in this regard, when these are considered in the context of his involvement in seeking collective bargaining concessions in favour of the company in the particular economic climate it is difficult for us to conclude that other employees would not reasonably have perceived him to be acting on behalf of or with the support of management.

25. The applicant argued that there was no evidence called by the respondent to establish any employee perception of Mr. Feener acting on behalf of management and that a negative inference ought to be drawn from the respondent's failure to challenge Mr. Feener's inclusion on the list of employees as well as his right to bring the present application by virtue of section 1(3)(b) of the Act.

26. We are unable to give much force to these arguments. The respondent conceded that Mr. Feener was not "managerial" within the meaning of section 1(3)(b); that concession does not determine the separate issue of whether he would be reasonably perceived to be acting on behalf of the employer. The Board addresses that question on an objective standard based on what the reasonable perception of employees would be. For that reason, the absence of any direct subjective evidence of employee perception is not significant. Indeed, the Board has often expressed its

aversion to requiring individual employees to testify as to their (potentially competing and differing) individual perceptions.

27. In summary, we are not satisfied that the petition filed in respect of the sheet metal unit represents the *voluntary* expression of the signatories thereto. Mr. Feener's application is consequently dismissed.

28. On the other hand, there was no evidence that Mr. Feener's duties extended beyond the sheet metal unit to the roofers' unit. Neither was there any evidence of direct involvement on his part in the circulation of the petition in the roofers' unit. We are satisfied that not less than forty-five percent of the employees in the roofers' unit have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union.

29. The Board directs that a representation vote be taken of the employees of Walden Roofing and Sheet Metal Co. Limited employed in the bargaining unit described in paragraph 6 above as the roofers' unit.

30. Until recently the Board's practice with respect to voter eligibility in construction industry representation votes has been to use dual voter eligibility dates i.e. those at work in the bargaining unit (voting constituency in pre-hearing certification applications) on *both* the date the vote is directed (the terminal date in pre-hearing certification applications) and the date the vote is taken.

31. In a recent decision (see *Crete Flooring Group Limited*, [1992] OLRB Rep. July 792) the Board has determined that, in representation votes resulting from certification applications in the construction industry, voter eligibility will be tied to a single date, namely the application date. In other words, those eligible to vote will be those at work in the bargaining unit or voting constituency, as the case may be, on the application date.

32. Shortly after the release of that decision, the Board issued a Notice to the Community, dated July 17, 1992, in the following terms:

The attention of the community is directed to the Board's recent decision in *Crete Flooring Group Limited* (decision dated July 8, 1992, not yet reported, Board file number 4150-91-). In *Crete Flooring*, the Board reconsidered its customary practice with respect to voter eligibility in construction industry certification applications.

The Board concluded that dual voter eligibility dates in the construction industry are not appropriate. It determined that establishing a *single* date (being the application date) was the more appropriate practice.

Accordingly, in construction industry certification applications, those eligible to vote will be those who work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date.

33. The Board can see no meaningful distinction to be made between voter eligibility date(s) in construction industry certification or termination representation votes. Subject to what follows, we see no reason why the reasoning of the *Crete* decision and consequent Notice to the Community ought not to apply equally to termination applications in the construction industry.

34. Hearing in the present matters was held on June 26, 1992. In accordance with the agreement of the parties, the last days for filing written submissions were July 17, 1992 for the respondent and July 24, 1992 for the applicant (although the parties did file some limited additional material beyond those dates). It is therefore not surprising that none of the parties raised the issue of

the voter eligibility date or referred to the *Crete* decision or the subsequent Notice to the Community. The Board is therefore not even aware of whether a single rather than the former dual voter eligibility date is of any practical or material significance in the present case.

35. In view of our comments above, all those at work in the roofers' unit on April 29, 1992 will be eligible to vote in the representation vote herein directed.

36. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Walden Roofing & Sheet Metal Co. Limited.

37. Should any of the parties wish to raise the issue of the voter eligibility date, they may do so by making the appropriate challenges to the voters' list prior to the date of the vote. Should any individual whose eligibility is challenged seek to vote they shall be permitted to mark a ballot which shall be segregated and not counted unless the parties subsequently agree on or the Board otherwise determines that person's eligibility to vote.

38. The matter is referred to the Registrar.

1812-91-OH Roger Kennedy, Applicant v. Whitler Industries Limited, Respondent

Adjournment - Discharge - Health and Safety - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and another employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

BEFORE: *Bram Herlich, Vice-Chair, and Board Members J. A. Rundle and D. A. Patterson.*

DECISION OF THE BOARD; August 7, 1992

1. This is a complaint alleging that the respondent (also referred to as the "employer" or the "company") violated section 50(1) (which formerly, and at the time this complaint was filed, was section 24(1)) of the *Occupational Health and Safety Act* ("OHSA").

2. Hearing in this matter commenced on October 8, 1991 and although the parties spent a considerable amount of time on that day in unsuccessful settlement discussions, the Board did hear the evidence of Leo Koller, the respondent's production manager during the relevant period. The respondent indicated it intended to call some seven witnesses; the complainant was of the view that it would call several witnesses as well. Consequently, the parties agreed to four continuation dates commencing on Monday January 6, 1992. Formal notices of these continuation dates were forwarded to the parties in November of 1991.

3. At approximately 4:00 p.m. on Friday January 3, 1992, Mr. Rod Parker, president of the respondent company, forwarded the following communication to the Registrar by facsimile transmission:

As confirmed by telephone we must request an adjournment of the above scheduled hearing January 6, 7, 20, 27, 1992.

We suggest that the hearings begin on the 20th since these dates are already reserved.

The company is not able to provide the *time* and *expense* for the witnesses to appear on the 6th or 7th.

• • •

[Emphasis in the original]

4. Mr. Parker appeared before the Board on behalf of the respondent at the commencement of the hearing on the following Monday. He did not, however, produce any of the witnesses earlier adverted to. He advised us that he was still seeking an adjournment, that he was only appearing at that time out of respect for the Board and he encouraged us to rule quickly on his adjournment request since, regardless of what our ruling might be, he was leaving at 10:00 a.m. He sought the adjournment because as the person responsible for running the business his judgement was that he could not afford to bring witnesses away from work to the hearing and because he had several important business meetings to attend to. He suggested the matter be put over to the January 20 and 27 hearing dates already scheduled but was unable to offer any assurance that he would be in any better position to appear before the Board on those dates.

5. It is trite to suggest that if inconvenience to a respondent were an acceptable basis upon which to (perhaps indefinitely) delay hearings before the Board, the remedial effect of the OHSA (and, indeed, other legislation the Board administers) would be dramatically undermined. Neither were we impressed with what was essentially an ultimatum presented to the Board, albeit cloaked in terms of the respondent's "respect" for the Board. We denied the respondent's adjournment request, Mr. Parker then departed and the hearing proceeded in the absence of the respondent. We heard the uncontradicted evidence of the complainant and ruled orally that the respondent had violated section 50(1) of the OHSA. We now provide our reasons for that ruling as well as our determination with respect to remedy.

6. In coming to its findings of fact the Board has carefully considered all of the evidence before it and taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers, and what seems most probable in all the circumstances. More particularly, we note that Mr. Koller, in giving his evidence before the Board, was evasive, vague and non-responsive. He often seemed to be tailoring his responses to minimize any culpability on the part of the respondent. On the other hand, in view of the events already recounted, the evidence of the complainant was uncontradicted and was also internally consistent. We have therefore been unable to place much weight on the evidence of Mr. Koller. We accept the complainant's evidence including in those circumstances where it conflicts with that of Mr. Koller.

7. The complainant, Roger Kennedy, commenced his employment with the respondent in October of 1990. From then until the events giving rise to the present proceedings he spent the vast majority of his work time as a cabinet maker. The termination, in February of 1991, of a fellow employee, Wade Proctor, resulted in a complaint against the company alleging violation of the

OHSA (Board File No. 3248-90-OH). Hearing in that matter was held (before a different panel of the Board) on April 23, 1991. Mr. Kennedy appeared under summons and testified on behalf of Mr. Proctor at that hearing.

8. On the day following that hearing the complainant returned to work and avoided questions about the hearing from fellow employees who were all aware of his having testified despite the fact that the complainant had not advised them. Later in the day Mr. Koller called a meeting of all of the employer's factory personnel. He advised them that because of the "court case" and because of the "lies" told at the hearing the company would be forced to enforce health and safety regulations more strongly. Employees were advised that non-compliance, e.g. those not wearing safety equipment, would be subject to discharge. The complainant was the only one of the three witnesses who testified on behalf of Wade Proctor who was present at the meeting and we are satisfied that the innuendo and denunciation in Mr. Koller's remarks were deliberately directed at the complainant in a public fashion in front of his fellow employees.

9. By decision dated May 3, 1991, the panel of the Board seized with Mr. Proctor's complaint against the company determined that the termination was contrary to the OHSA and directed that Mr. Proctor be reinstated and compensated. Upon receiving a copy of the Board's decision in that case, another meeting of employees was convened, this time by Mr. Parker. He was extremely upset at having lost the case and denounced all those who had testified on behalf of Mr. Proctor as liars. A number of other less than complimentary statements were made, some while Mr. Parker stared quite deliberately at the complainant. Again, we are satisfied that this was done, at least in part, to publicly vilify the complainant for his role in the Proctor hearing.

10. A number of significant events followed the release of the Board's decision in the Proctor complaint.

11. The complainant's "reassignment" was virtually contemporaneous with the release of the Proctor decision. Previously the complainant spent the vast majority of his time at working as a cabinet maker. Subsequent to the Proctor award he was reassigned and consequently spent the majority of his time working on a machine called the edgebander. No one had ever previously been assigned to work full-time or primarily on this machine. The work on this machine was previously distributed amongst a number of different employees (or, on occasions, management personnel) presumably as an adjunct to their regular duties. The complainant viewed this reassignment as a demotion since the skills involved in performing this work were marginal as compared to those involved in his previous assignment. Not only did the complainant see his former duties reassigned to other employees, but not long after his reassignment, he discovered that a new employee was being trained to perform his former duties.

12. Although the complainant had no record of discipline prior to May, 1991, a number of events occurred in that month including disputes regarding the proper, safe and effective operation of the edgebander machine. The complainant also saw fifteen minutes of his pay docked because he left for a pre-arranged medical appointment after break time. It is not necessary for us to review these incidents in any detail. It is sufficient for our purposes to observe that, to the extent these are examples of disciplinary measures, however minor, imposed by the employer, we were not provided with any evidence credibly supporting or explaining the basis for their imposition.

13. Finally, for the purposes of the chronology of relevant events, the complainant, while off work on a leave approved by his physician, received the following correspondence dated July 29, 1991 from Mr. Parker:

We have recently assessed our employee needs and regret to inform you that your job has been re-assigned.

Therefore, should you wish to return to work at Whitler, we will keep your application, and employment record, but the position is no longer available.

Your record of earnings form is enclosed.

14. The Employment and Immigration Canada Record of Employment form prepared by the employer and furnished to the complainant indicates "illness or injury" as the reason for issuing the form and, rather than indicating the expected date of recall as either fixed or unknown, indicates that the complainant will not be returning to work. Not long after these events the complainant noticed that the employer had placed advertisements in a local newspaper seeking employees to do work similar to that which he had previously performed.

15. Section 50 of the *Occupational Health and Safety Act* provides as follows:

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

• • •

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

16. Although reinstatement is the presumptive remedy in the case of an unlawful discharge under the OHSA, reinstatement was not sought in this case.

17. Having regard to the largely uncontradicted evidence before us, the reverse onus provision of section 50(5), the absence of any credible explanation from the respondent, and the timing of the events in question, we are satisfied that the employer actions just recounted and, in particular, the termination of the complainant were taken, at least in part, because the complainant gave evidence in a proceeding in respect of the enforcement of the OHSA and are consequently in violation of section 50(1) of that Act.

18. Having regard to the entirely uncontradicted evidence and submissions of the complainant, we are satisfied that the damages which flow from the respondent's violation of the Act amount to six thousand nine hundred and forty-six dollars and seventy-five cents (\$6,946.75). The respondent is hereby directed to pay this amount to the complainant forthwith. In addition, the respondent is directed to post a copy of this decision in a prominent location in the workplace where it is likely to come to the attention of its employees for a period of sixty days.

CONCURRING OPINION OF BOARD MEMBER JUDITH A. RUNDLE; August 7, 1992

1. While I concur with the Board's ultimate disposal of this case I wish to comment specifically on paragraphs 4 and 5 of the decision with a view to providing a different perspective on the respondent's actions.

2. Mr. Parker did appear on the hearing date without any of the witnesses he had earlier indicated he would be calling. His reasoning for not bringing his witnesses - all of whom were employed at the respondent company, was quite simple. In his opinion as the person responsible for running the company and ensuring its continued existence, in difficult financial times, he made a business decision that it was in the best interests of the company and its employees to remain at work rather than shut down the plant to attend our hearing. We were led to believe, (I have no reason to doubt) that the respondent's financial situation and indeed its continued operation was precarious and such a shut down would have major implications for the respondent and its employees. Mr. Parker informed the Board that he would not attend beyond 10:00 a.m. regardless of our ruling on his adjournment request. The "important business meetings" Mr. Parker had to attend to were, a meeting with his bonding company followed by a meeting with his bank. Both meetings were to ensure continued financial support for his company. I also agreed with the majority that Mr. Parker could not ensure the Board that he would be able to attend any of the hearing dates already scheduled - the financial situation of his company was such that he did not know whether he would be in a different financial situation or whether his position would be the same on those dates.

3. I agree that inconvenience to a party is not an acceptable reason to delay any hearing before the Board. The decision not to grant the adjournment was unanimous, based for my part, on the Board's jurisprudence. I did not view Mr. Parker's adjournment request as "an ultimatum cloaked in terms of "respect" for the Board." Mr. Parker was faced with several decisions. First - should he keep his employees at work rather than shut down the operation to have them appear as witnesses. Secondly, should he attend the meetings with his binding company and the bank to ensure that his employees would still continue to work. Thirdly should he attend at the Board and pursue his adjournment request. I am not sure I disagree with the decision Mr. Parker made. After all the complainant in our case was employed with another company, faced with that fact Mr. Parker decided to try and protect the jobs of his remaining employees. Whether he was successful or not is something this Board is not aware of.

4. Finally Mr. Parker's dilemma and the choices he had to make are regrettably becoming the norm in this province as more companies are facing serious financial setbacks. This is an unfortunate reality that this Board will be forced to take into account in its deliberations in the future.

CASE LISTINGS JULY 1992

		PAGE
1.	Applications for Certification	175
2.	Applications for First Contract Arbitration	187
3.	Applications for Declaration of Related Employer.....	187
4.	Sale of a Business	188
5.	Crown Transfer Act	188
6.	Union Successor Rights	189
7.	Applications for Declaration Terminating Bargaining Rights.....	189
8.	Applications for Declaration of Unlawful Strike (Construction Industry)	191
9.	Direction respecting Unlawful Lockout	191
10.	Complaints of Unfair Labour Practice	191
11.	Applications for Consent to Prosecute.....	194
12.	Applications for Consent to Early Termination of Collective Agreement	194
13.	Financial Statement	195
14.	Jurisdictional Disputes.....	195
15.	Applications for Determination of Employee Status.....	195
16.	Complaints under the Occupational Health and Safety Act.....	195
17.	Construction Industry Grievances	195
18.	Applications for Reconsideration of Board's Decision	200

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1499-90-R; 1500-90-R; 1512-90-R: International Union of Operating Engineers, Local 793, (Applicant) v. Camaro Enterprises Limited, (Respondent) v. Group of Employees, (Objectors)

Unit: "all employees of Camaro Enterprises Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing the same, and those employees of Camaro Enterprises Limited engaged as surveyors, construction labourers and truck drivers, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman" (92 employees in unit)

0365-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663, (Applicant) v. Sarnia Wolverine Manufacturing Limited, (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Sarnia Wolverine Manufacturing Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Sarnia Wolverine Manufacturing Ltd. in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1358-91-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto, (Applicant) v. Haulover Investments Ltd. carrying on business as Bayview Playhouse (Respondent)

Unit: "all stage employees employed by Haulover Investments Ltd. carrying on business as Bayview Playhouse in Metropolitan Toronto, save and except supervisors and those above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

2268-91-R: Ontario Nurses' Association, (Applicant) v. Belleville General Hospital, (Respondent) v. Group of Employees, (Objectors)

Unit #1: "all registered and graduate nurses employed as case managers in Home Care by the respondent in the County of Hastings, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and persons in bargaining units for which other trade unions held bargaining rights as of October 3, 1991" (61 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses regularly employed for not more than 24 hours per week as case managers in Home Care by the respondent in the County of Hastings, save and except supervisors, persons above the rank of supervisor, and persons in bargaining units for which other trade unions held bargaining rights as of October 3, 1991" (39 employees in unit) (*Having regard to the agreement of the parties*)

2292-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. Altoba Developments Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of Altoba Developments Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Altoba Developments Ltd. in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

2739-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belrock Construction General Contractor Limited (Respondent)

Unit: “all carpenters, and carpenters’ apprentices in the employ of the Belrock Construction General Contractor Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters, and carpenters’ apprentices in the employ of the Belrock Construction General Contractor Limited in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

3418-91-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Gorf Contracting Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the Gorf Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the Gorf Contracting Ltd. in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (0 employees in unit)

3807-91-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 Affiliated with Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Hostess Frito-Lay Co. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of The Hostess Frito-Lay Co. working in Sudbury, Sturgeon Falls, and Espanola, save and except supervisors, those above the rank of supervisor and office staff” (41 employees in unit)

0036-92-R: Ontario Sheet Metal Workers’ & Roofers’ Conference Sheet Metal Workers’ International Association, Local 30 (Applicant) v. Servocraft Limited (Respondent)

Unit: “all journeymen and apprentices sheet metal workers in the employ of Servocraft Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentices sheet metal workers in the employ of Servocraft Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0049-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. ABLE Drywall Ltd., S. Vitello Drywall (Respondents)

Unit: “all carpenters and carpenters’ apprentices in the employ of Able Drywall Ltd. and S. Vitello Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Able Drywall Ltd. and S. Vitello Drywall in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0493-92-R: Canadian Union of Public Employees, Local 1281 (Applicant) v. Association of Part-Time Undergraduate Students of the University of Toronto (Respondent)

Unit: “all employees of the Association of Part-Time Undergraduate Students of the University of Toronto, save and except Executive Director and persons above the rank of Executive Director” (8 employees in unit) *(Having regard to the agreement of the parties)* *(Clarity Note)*

0616-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Stile Contracting Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Stile Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Stile Contracting Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0636-92-R: United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. 816632 Ontario Limited c.o.b. as Knechtel’s Food Market (Respondent)

Unit #1: “all employees of 816632 Ontario Limited c.o.b. as Knechtel’s Food Market in the Town of Southampten, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff and persons regularly employed for not more than 24 hours per week” (27 employees in unit) *(Clarity Note)*

Unit #2: “all employees of 816632 Ontario Limited c.o.b. as Knechtel’s Food Market in the Town of Southampten regularly employed for not more than 24 hours per week, save and except Department Managers, persons above the rank of Department Managers, office and clerical staff” (28 employees in unit) *(Clarity Note)*

0640-92-R: Canadian Paperworkers Union (Applicant) v. Nipigon Red Rock and District Association for Community Living (Respondent)

Unit: “all employees of Nipigon Red Rock and District Association for Community Living in the Township of Nipigon, save and except supervisors and persons above the rank of supervisor” (11 employees in unit) *(Having regard to the agreement of the parties)*

0670-92-R: International Union of Bricklayers and Allied Craftsmen, Local 4 Ontario (Applicant) v. ABE Dick Masonry Limited (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices and stonemasons and stonemasons’ apprentices, in the employ of Abe Dick Masonry Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (20 employees in unit)

0671-92-R: International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario (Applicant) v. Cecchini Masonry Limited (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Cecchini Masonry Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Cecchini Masonry Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

0679-92-R: Ontario Public Service Employees Union (Applicant) v. Women’s Counselling Referral and Education Centre (Respondent)

Unit: “all employees of the Women’s Counselling Referral and Education Centre in the Municipality of Metropolitan Toronto, save and except Directors and persons above the rank of Director” (8 employees in unit)

0719-92-R: Christian Labour Association of Canada (Applicant) v. Dura-Medical Equipment Ltd. c.o.b. as Maple Court Villa (Respondent)

Unit: “all employees of Dura-Medical Equipment Ltd. c.o.b. as Maple Court Villa in the Town of Walkerton, save and except Managers, persons above the rank of Manager, office and clerical staff and Director of Care” (14 employees in unit)

0784-92-R: Ontario English Catholic Teachers’ Association (Applicant) v. Kenora District Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers as defined by section 1(a) 31 of the *Education Act* employed by Kenora District Roman Catholic Separate School Board in the District of Kenora, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*” (27 employees in unit) (*Having regard to the agreement of the parties*)

0805-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Massey Centre for Women (Respondent)

Unit #1: “all employees of Massey Centre for Women in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff and persons regularly employed for not more than 24 hours per week” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (see Applications for Certification Dismissed without vote)

0809-92-R: IWA-Canada (Applicant) v. Beacon Hill Lodges Inc. c.o.b. as Place Mont Roc (Respondent)

Unit: “all employees of Beacon Hill Lodges Inc. c.o.b. as Place Mont Roc in the Municipality of Hawkesbury, save and except Supervisors, persons above the rank of Supervisor and office and clerical staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

0840-92-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. 592113 Ontario Limited c.o.b. as Olympic Metal Products, Morgese-Soriano Co. Patina V. Canada (Respondent)

Unit: “all employees of 592113 Ontario Limited c.o.b. as Olympic Metal Products, Morgese-Soriano Co. Patina V. Canada in the Regional Municipality of Metropolitan Toronto, save and except Foremen, persons above the rank of Foreman, office, clerical and sales staff, Make Up Artists, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

0844-92-R: Brantford Typographical Union Local 378 (Applicant) v. Southam Inc. (Respondent)

Unit: “all employees of Southam Inc. in its division, The Expositor in Brantford employed in the composing department, save and except persons above the rank of Technology Co-ordinator and persons in bargaining units for which any trade union held bargaining rights as of June 17, 1992” (7 employees in unit) (*Having regard to the agreement of the parties*)

0847-92-R: Teamsters Local Union No. 879 (Applicant) v. Crane Canada Inc. (Crane Supply Division) (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Crane Canada Inc. (Crane Supply Division) in the City of Hamilton, save and except Supervisors, persons above the rank of Supervisor, office and sales staff and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0860-92-R: Service Employees Union Local 268 Affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. George Jeffrey Children's Treatment Centre (Respondent) v. Group of Employees (Objectors)

Unit: "all Speech Language Pathologists, Speech Therapists, Augmentative Communication Assistants, Physiotherapists, Occupational Therapists, Physiotherapy Assistants, Social Workers, Education Consultants, Therapy and Rehabilitation Technicians and Volunteer Coordinators employed by George Jeffrey Children's Treatment Centre in the City of Thunder Bay, save and except Supervisors and persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0861-92-R: Service Employees Union Local 268 Affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. George Jeffrey Children's Treatment Centre (Respondent) v. Group of Employees (Objectors)

Unit: "all Speech Language Pathologists, Speech Therapists, Augmentative Communication Assistants, Physiotherapists, Occupational Therapists, Physiotherapy Assistants, Social Workers, Education Consultants, Therapy and Rehabilitation Technicians and Volunteer Coordinators employed by George Jeffrey Children's Treatment Centre in the City of Thunder Bay who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Supervisors and persons above the rank of Supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0890-92-R: Energy and Chemical Workers Union (Applicant) v. A & L Canada Laboratories East, Inc. (Respondent)

Unit: "all employees of A & L Canada Laboratories East, Inc. in the City of London, save and except Supervisors, persons above the rank of Supervisor, maintenance staff, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

0892-92-R: Ontario Public Service Employees Union (Applicant) v. Air Escort Registry of Ontario (A.E.R.O.) (Respondent)

Unit: "all employees of Air Escort Registry of Ontario (A.E.R.O.) in the Township of West Carleton, save and except Supervisors and persons above the rank of Supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

0895-92-R: The Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the City of Kingston and the County of Frontenac (Incorporated) (Respondent)

Unit: "all employees of The Children's Aid Society of the City of Kingston and the County of Frontenac (Incorporated) in the City of Kingston and the County of Frontenac, save and except Supervisors, persons above the rank of Supervisor, Office Manager, Secretary to the Executive Director and persons for whom any trade union held bargaining rights as of June 18, 1992" (13 employees in unit) (*Having regard to the agreement of the parties*)

0904-92-R: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all security guards in the employ of Meadowvale Security Guard Services Inc. at 711 and 717 Bay Street and 44 Gerrard St. West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (13 employees in unit) (*Having regard to the agreement of the parties*)

0911-92-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. 810048 Ontario Limited c.o.b. as Loeb I.G.A. Highland (Respondent)

Unit: "all employees of 810048 Ontario Limited c.o.b. as Loeb I.G.A. Highland in the City of Cambridge employed in the Meat Department, save and except Department Manager, persons above the rank of Department Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

0945-92-R: Communications and Electrical Workers of Canada, (Applicant) v. METI Telecommunications Installations Inc., (Respondent)

Unit: “all employees of METI Telecommunications Installations Inc. in the Municipality of Metropolitan Toronto, save and except Manager and persons above the rank of Manager and office staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

0953-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. UAP Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of UAP Inc. at its Distribution Centre at 725 Belfast Road in the City of Ottawa, save and except Supervisors, persons above the rank of Supervisor, office staff, outside sales staff and customer service staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (18 employees in unit) (*Having regard to the agreement of the parties*)

0962-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pyrotex Ltee. (Respondent)

Unit: “all employees of Pyrotex Ltee in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Pyrotex Ltee in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0964-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Goldlist Property Management (Respondent)

Unit: “all employees of Goldlist Property Management engaged in cleaning and maintenance at 30 Elm Drive in the City of Mississauga, including resident superintendents, save and except Property Manager and persons above the rank of Property Manager” (2 employees in unit) (*Having regard to the agreement of the parties*)

0970-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. M. Kimel Realty, (Respondents)

Unit: “all employees of M. Kimel Realty engaged in cleaning and maintenance at 484 and 494 Avenue Road in the Municipality of Metropolitan Toronto, including Resident Superintendents, Assistant Superintendents, doorpersons, maintenance employees, general handymen and persons employed for not more than 24 hours per week, save and except Property Managers and persons above the rank of Property Manager” (10 employees in unit) (*Having regard to the agreement of the parties*)

0976-92-R: Canadian Union of Public Employees (Applicant) v. The Walden Public Library Board (Respondent)

Unit: “all employees of The Walden Public Library Board in the Town of Walden, save and except Administrators and persons above the rank of Administrator and pages” (9 employees in unit) (*Having regard to the agreement of the parties*)

0984-92-R: Canadian Union of Public Employees (Applicant) v. Sunny Face Day Care Centre Inc. (Respondent)

Unit: “all employees of Sunny Face Day Care Centre Inc. located at 30 Harefield Drive in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

1002-92-R: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all Security Guards in the employ of Meadowvale Security Guard Services Inc. at 40 Homewood Avenue in the Municipality of Metropolitan Toronto, save and except Supervisors and those above the rank of Supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

1004-92-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Todd Canada Inc. (Respondent)

Unit: “all employees of Todd Canada Inc. in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, sales, office and clerical staff” (36 employees in unit) (*Having regard to the agreement of the parties*)

1006-92-R: Graphic Communications International Union Local 466 (Applicant) v. 970589 Ontario Inc. c.o.b. as Styleline Embroidery (Respondent)

Unit: “all employees of 970589 Ontario Inc. c.o.b. as Styleline Embroidery in the City of Mississauga, save and except Foremen, persons above the rank of Foreman, office and sales staff and persons regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*)

1027-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. B.W.A. Foods Inc. c.o.b. as Sandalwood Loeb (Respondent)

Unit: “all employees of B.W.A. Foods Inc. c.o.b. as Sandalwood Loeb in the City of Mississauga, save and except Store Managers, persons above the rank of Store Manager, office and clerical staff, and persons regularly employed in its Meat Department for more than 24 hours per week” (155 employees in unit) (*Having regard to the agreement of the parties*)

1030-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Targa Construction Incorporated (Respondent)

Unit: “all employees of Targa Construction Incorporated in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1063-92-R: International Brotherhood of Electrical Workers’, Local 120 (Applicant) v. Myles Service Co. Inc. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Myles Service Co. Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Myles Service Co. Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1064-92-R: Energy and Chemical Workers Union (Applicant) v. Fischer - Hallman Service Center Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Fischer - Hallman Service Center Inc. at 775 Highland Road West in the City of Kitchener, save and except Forepersons and persons above the rank of Foreperson, office and sales staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

1115-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ojibway Lakes (Windsor) Inc. (Respondent)

Unit: “all employees of Ojibway Lakes (Windsor) Inc. employed at its pit located between Highway #18,

Sprucewood Road, Matchette Road and Morton Drive in the City of Windsor, save and except Foremen, persons above the rank of Foreman, office and clerical staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1133-92-R: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all Security Guards in the employ of Meadowvale Security Guard Services Inc. at 26 Wellington Street East, Toronto, save and except Supervisors and persons above the rank of Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1138-92-R: Labourers' International Union of North America, Local 527 (Applicant) v. C.M. McNally Engineering (Respondent)

Unit: "all construction labourers in the employ of C.M. McNally Engineering in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of C.M. McNally Engineering in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1148-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pilen Construction of Canada Ltd. (Respondent)

Unit: "all employees of Pilen Construction of Canada Ltd. in the Province of Ontario in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

4078-91-R: Ontario Public School Teachers' Federation (Applicant) v. Leeds and Grenville County Board of Education (Respondent)

Unit: "all occasional teachers employed by the Leeds and Grenville County Board of Education in its elementary school in the Leeds and Grenville County, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and *Teachers' Collective Negotiations Act*" (200 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	202
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	3

0651-92-R: Canadian Union of Public Employees (Applicant) v. Lake of the Woods District Hospital (Respondent)

Unit: "all paramedical employees of the Lake of the Woods District Hospital in Kenora, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of May 27, 1992" (60 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	45
Number of persons who cast ballots	37

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	11

0806-92-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Bellwoods Centres for Community Living Inc. (Respondent)

Unit: "all employees of Bellwoods Centres for Community Living Inc. in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except program co-ordinators, team leaders and persons above the rank of program co-ordinator, team leaders, independent living co-ordinators, transitional living co-ordinators, community service workers, office and clerical staff" (55 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	61
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by whose names appear on voter's list	12
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0637-92-R: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Fashion Interiors Ltd. and Robert Wilson Painting Ltd. (Respondent) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Intervener)

Unit: "all journeymen and apprentice painters in the employ of Fashion Interiors Ltd. and Robert Wilson Painting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice painters in the employ of Fashion Interiors Ltd. and Robert Wilson Painting Ltd. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of persons listed as eligible	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	1

Applications for Certification Dismissed Without Vote

1408-91-R: Ironworkers District Council of Ontario (Applicant) v. Canadian Communications Structures Inc. (Respondent) (6 employees in unit)

2335-91-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Concan Foods Ltd. c.o.b. as Chi-Chi's Mexican Restaurant c.o.b. currently under the Trusteeship of Coopers and Lybrand Limited and Coopers and Lybrand (Respondents) v. Group of Employees (Objectors)

Unit #1: (see Applications for Certification Dismissed subsequent to a Post-Hearing vote)

Unit #2: "all employees of the respondent at its location in the City of London regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except hourly managers, persons above the rank of hourly manager, office and clerical staff and cleaning maintenance staff" (55 employees in unit)

2379-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Jaltas Construction Inc. (Respondent) (2 employees in unit)

3907-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Mead Johnson Canada Inc. (Respondent) v. Group of Employees (Objectors) (84 employees in unit)

0488-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ellerby General Contracting Ltd. (Respondent) (5 employees in unit)

0490-92-R; 0491-92-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. The Douglas MacDonald Development Corporation c.o.b. Chimo Inns (Respondent) v. Group of Employees (Objectors) (72 employees in unit)

0805-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Massey Centre for Women (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: “all employees of Massey Centre for Women in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff and Pastor” (21 employees in unit) (*Clarity Note*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

4167-91-R: Labourers International Union of North America, Local 506 (Applicant) v. Clifford Masonry Limited and/or Clifford Restoration Limited (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local Union Number 172 Restoration Steeplejacks, International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervenors)

Unit #1: “all masonry restoration employees (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and (ii) all other sectors of the construction industry, save and except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham” (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	11
Number of persons who cast ballots	8
Number of segregated ballots cast by persons whose names appear on voter’s list	8

0686-92-R: Canadian Union of Public Employees (Applicant) v. Huron County Library (Respondent)

Unit #1: “all employees of Huron County Library, save and except Branch Supervisors I, all persons above the rank of Branch Supervisor I, Office Manager and Secretary to the Chief Librarian” (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	38
Number of persons who cast ballots	35
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	30

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2335-91-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC, (Applicant) v. Concan Foods Ltd. c.o.b. as Chi-Chi’s Mexican Restaurants c.o.b. currently under the Trusteeship of Coopers and Lybrand Limited, (Respondents) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent at its location in the City of London save and except hourly managers, persons above the rank of hourly manager, office and clerical staff, cleaning maintenance staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (22 employees in unit)

Number of persons listed as eligible	60
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	45

Unit #2: (see Applications for Certification Dismissed without vote)

4065-91-R: Service Employees Union Local 268, affiliated with the A.F. of L., C.I.O. and C.L.C., (Applicant) v. Hogarth-Westmount Hospital (Respondent)

Unit: “all office and clerical employees of Hogarth-Westmount Hospital in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of March 17, 1992 that being the date of this application” (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	23
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	1

0478-92-R: IWA-Canada (Applicant) v. Gogama Forest Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Gogama Forest Products Ltd. at its Woodfibre Processing Plant (sawmill) and work-sites in the yard located at or near the CN Siding of Ostrom, Highway 560, in the Township of Westbrook, save and except Foremen, persons above the rank of Foreman, office and sales staff” (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	32
Number of persons listed as in dispute	32
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	23

0487-92-R: Canadian Union of Public Employees (Applicant) v. The Hastings-Prince Edward County Roman Catholic Separate School Board (Respondent)

Unit: “all office and clerical employees of The Hastings-Prince Edward County Roman Catholic Separate School Board at its Administrative Offices in the Counties of Hastings and Prince Edward, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Director of Education, Secretaries to the Superintendents, Purchasing Agent, Transportation Assessment Officer, Special Projects Officer and persons for whom any trade union held bargaining rights as of May 11, 1992” (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	8

Applications for Certification Withdrawn

0588-92-R: International Union of Bricklayers & Allied Craftsmen Local No. 7 (Applicant) v. Robert Const. Co. (1970) Ltd. General Contractor (Respondent)

0672-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 263009-5 Ontario Limited c.o.b. as Jumec Construction Incorporated (Respondent)

0720-92-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Teston Pipelines Limited (Respondent)

0748-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bardswich L. J. Ltd. (Respondent)

0820-92-R: International Brotherhood of Electrical Workers', Local 120 (Applicant) v. Myles Service Co. Inc. (Respondent)

0831-92-R: Labourers' International Union of North America, Local 527 (Applicant) v. Smith Construction Company (Respondent) v. Group of Employees (Objectors)

0858-92-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Scott Electric 845580, Ontario, Inc. (Respondent)

0876-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dualex Enterprises Inc. (Respondent)

0965-92-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Taylor Manufacturing Industries Inc., (Respondent)

1065-92-R: Energy and Chemical Workers Union (Applicant) v. Ed Sobol's Mr. Lube (Respondent)

1066-92-R: Energy and Chemical Workers Union (Applicant) v. Ed Sobol's Mr. Lube (Respondent)

1097-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Arcam Engineering Ltd. (Respondent)

1159-92-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. 822815 Ontario Inc. o/a LOEB Parkways West (Respondent)

1160-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 822815 Ontario Inc. c/a LOEB Parkways West (Respondent)

1186-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Memme Excavation Co. Limited (Respondent)

1248-92-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. Kor-Ban Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

3122-91-FC: Labourers' International Union of North America, Local 183 (Applicant) v. Karwald Industries Limited (Respondent) (*Granted*)

0550-92-FA: United Food and Commercial Workers International Union, Local 1000A (Applicant) v. Bavarian Meat Products Ltd. and 965349 Ontario Limited c.o.b. Bavarian Meats (Retail) (Respondents) (*Granted*)

0817-92-FC: Service Employees' International Union, Local 204 (Applicant) v. Istituto Nazionale per Il Commercio Estero (Italian Trade Commission) (Respondent) (*Granted*)

1035-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Piccirillo Masonry Ltd. (Respondent) (*Granted*)

1036-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. CN Bricklayers Inc. (Respondent) (*Granted*)

1038-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. First Masonry (Respondent) (*Granted*)

1039-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Mill Masonry Ltd. (Respondent) (*Granted*)

1040-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Masccone Masonry Group (Respondent) (*Granted*)

1041-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. T.C. Bricklayers (Respondent) (*Granted*)

1050-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Model Masonry (Respondent) (*Granted*)

1051-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Franca Masonry (Respondent) (*Granted*)

1052-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. G.R.S. Construction Ltd. (Respondent) (*Granted*)

1053-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. J.C. Melo Masonry (Respondent) (*Granted*)

1134-92-FC: United Brotherhood of Carpenters & Joiners, Local Union 1669 (Applicant) v. Silvano Ferrato Construction, Division of 825420 Ontario Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0819-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ottawa Interior System Inc., 927893 Ontario Limited, Tristan Construction Limited (Respondents) (*Withdrawn*)

3098-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trimen Food Service Equipment Inc., TCS Food Service Equipment Inc. (Respondents) (*Withdrawn*)

3501-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eagle Electric, 928665 Ontario Ltd., carrying on business as Eagle-Tech., 652811 Ontario Limited, carrying on business as C.B. Electric Co. (Respondents) (*Granted*)

3708-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tamblyn-Pritchard-Johnston Construction Limited, Tamblyn-Pritchard Construction Inc., Pritchard Consulting Services Incorporated and Tamblyn-Pritchard Management Inc. (Respondents) (*Granted*)

0387-92-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. F.C. Warder Radio Limited and Pro-Install Multisystems Inc. (Respondents) (*Withdrawn*)

0460-92-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited and 971036 Ontario Ltd. (Respondents) (*Granted*)

0501-92-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Lewin Kingston Mechanical Contractors, Lewin Kingston Division of Brousseau-Robidoux Enterprises Ltd., Regional Network Contractors Ltd., ML Office Enterprises (Respondents) (*Granted*)

0779-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Nils Mechanical Systems Ltd. and Cool Team Mechanical Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3157-89-R: Service Employees International Union, Local 532 (Applicant) v. Saint Elizabeth Home Society, Ontario Ministry of Health and Hamilton Jewish Home for the Aged Charitable Foundation operating as Shalom Village South (Respondents) (*Granted*)

0819-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ottawa Interior System Inc., 927893 Ontario Limited, Tristan Construction Limited (Respondents) (*Withdrawn*)

3098-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trimen Food Service Equipment Inc., TCS Food Service Equipment Inc. (Respondents) (*Withdrawn*)

0317-92-R: United Steelworkers of America (Applicant) v. K.M.C. Manufacturing Inc. and Rusco Canada Manufacturing Ltd. (Respondents) (*Withdrawn*)

0387-92-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. F.C. Warder Radio Limited and Pro-Install Multisystems Inc. (Respondents) (*Withdrawn*)

0460-92-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited and 971036 Ontario Ltd. (Respondents) (*Granted*)

0501-92-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Lewin Kingston Mechanical Contractors, Lewin Kingston Division of Brousseau-Robidoux Enterprises Ltd., Regional Network Contractors Ltd., ML Office Enterprises (Respondents) (*Granted*)

0509-92-R: Millworkers Local #802 - United Brotherhood of Carpenters and Joiners of America (Applicant) v. United Co Operators Petroleum Inc. (Respondent) (*Withdrawn*)

0780-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Nils Mechanical Systems Ltd. and Cool Team Mechanical Inc. (Respondents) (*Withdrawn*)

CROWN TRANSFER ACT

3156-89-R: Service Employees International Union, Local 532 (Applicant) v. Saint Elizabeth Home Society, Ontario Ministry of Health and Hamilton Jewish Home for the Aged Charitable Foundation operating as Shalom Village South (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0607-92-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 471 (Applicant) v. Grand Theatre Board of Management (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4032-91-R: Lou Kozic, Vito Del Re, Tom Capretta, Henry Fedrigoni, Mario Cosentino and Giovanni Rumeo (Applicants) v. The International Brotherhood of Electrical Workers and The IBEW Construction Council of Ontario and International Brotherhood of Electrical Workers, Locals 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687 and 1739 (Respondent) v. Duplex Electrical Ltd. (Intervener)

Unit #1: “all electricians and electricians’ apprentices employed by Duplex Electrical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit) (*Granted*)

Number of persons listed as eligible	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

Unit #2: “all electricians and electricians’ apprentices employed by Duplex Electrical Ltd. in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit) (*Granted*)

Number of persons listed as eligible	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

4115-91-R: Paul Gerber, on his own behalf and on behalf of certain employees of Lume Masonry Ltd. (Applicant) v. Labourers’ International Union of North America, Ontario Provincial District Council (Respondent) v. Lume Masonry Ltd. (Intervener)

Unit: “all construction labourers in the employ of Lume Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Lume Masonry Ltd. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working Foremen and persons above the rank of non-working Foreman” (2 employees in unit) (*Granted*)

Number of persons listed as eligible	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked against respondent	2

0223-92-R: Herman Waeijen (Applicant) v. Local No. 473 Sheet Metal Workers’ International Association (Respondent) v. 397026 Ontario Limited o/a Ambient Systems (Intervener)

Unit: “All journeymen and apprentice sheet metal workers, sheeters, sheeters’ assistants and material handlers in the employ of the employer in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario” (4 employees in unit) (*Granted*)

0286-92-R: Larry Jette, Peter Makrakis, Salvatore Giglio (Applicant) v. Local 1824 Painters & Allied Trades Union (Respondent) v. Waterloo Region Separate School Board (Intervener) (3 employees in unit) (*Dismissed*)

0291-92-R: David Shedler, representing the employees of Galrich Contracting Limited (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Galrich Contracting Limited (Intervener) (*Withdrawn*)

0339-92-R: Employees of Empire Restoration Inc. (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (Respondents) v. Empire Restoration Inc. (Intervener) (4 employees in unit) (*Granted*)

0350-92-R: William Droogh (Applicant) v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario representing the following affiliated Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687 and 1739 (Respondent) v. Doug Hill Electric Inc. (Intervener)

Unit: "all foremen, journeyman linemen-splicers, apprentice linemen-splicers, groundman/equipment operators, groundman/drivers, groundmen, utilitymen and foresters performing work within the acknowledged jurisdiction of the union" (1 employees in unit) (*Granted*)

Number of persons listed as eligible	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

0503-92-R: Susan E. Wight (Applicant) v. Cement, Lime, Gypsum and Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CFL (Respondent) v. Essroc Canada Inc. (Intervener)

Unit: "all office and clerical employees of Essroc Canada Inc. at its premises in the Township of Sophiasburgh in the County of Prince Edward, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, Secretary to the Plant Manager, Secretary to the Vice-president, Personnel Assistant, engineering and technical staff and Senior Accountant" (6 employees in unit) (*Granted*)

Number of persons listed as eligible	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5

0655-92-R: Norriston Cornwall, Durval Samuels, Joyce Chisholm, Margaret Bechan, Oswald Henry, Oscar A. Chacon, Kyle Wyer, Grzegorz Bialas (Applicants) v. United Steelworkers of America (Respondent) v. Kirsch Canada Division of Cooper Industries Inc. (Intervener) (13 employees in unit) (*Dismissed*)

0717-92-R: Kevin McCarthy (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 Windsor, Ontario (Respondent) v. Trades Incorporated (Intervener) (9 employees in unit) (*Granted*)

0785-92-R: Robert Rutherford and Gary Colman acting for the hourly paid employees of Winston Steel Inc. (Applicants) v. The United Steel Workers of America (Respondent) v. Winston Steel Inc. (Intervener) (35 employees in unit) (*Granted*)

0901-92-R: Saverio D'Elia (Applicant) v. United Food and Commercial Workers International Union Local 175 (Respondent) v. Mario Grossi (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1224-92-U: Set Construction Ltd. (Applicant) v. Andre Papineau, Mark Middleton, Bernie Carozzi, Adriano Rozzi, Len Budge, Rick Kerr, International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 527, Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, and Labourers' International Union of North America, Ontario Provincial District Council (Respondents) (*Withdrawn*)

DIRECTION RESPECTING UNLAWFUL LOCKOUT

0983-92-U: The Canadian Union of Public Employees, Local 1115 (Applicant) v. The Corporation of the City of Welland (Respondent) (*Withdrawn*)

1068-92-U: United Electrical, Radio and Machine Workers of Canada, Local 517 (Applicant) v. The Corporation of the City of Welland and Richard Reuter and Victor Kerschl (Respondents) (*Withdrawn*)

1069-92-U: United Electrical, Radio and Machine Workers of Canada, Local 517 (Applicant) v. The Corporation of the City of Welland and Richard Reuter and Victor Kerschl (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1015-90-U: Gerhard Golke (Complainant) v. C.A.W. Union - Local 240 (Respondent) (*Dismissed*)

1348-90-U: Gerhard Golke (Complainant) v. Green Shield Prepaid Services Inc., Green Shield Associated Services Inc. (Respondents) (*Dismissed*)

0857-91-U: Jacques Fillion (Complainant) v. I.W.A. Canada, Local 2693 and Kimberly Clark Canada Inc. (Respondents) (*Dismissed*)

1496-91-U: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Complainant) v. Canadian Communication Structures Inc. (Respondent) (*Dismissed*)

1981-91-U: William Curtis (Complainant) v. Don Holder, John McInnes, Cecil Makowski, Gerald Estey, Canadian Paperworkers Union, Local 134, Canadian Paperworkers Union and Abitibi-Price Inc. (Respondents) (*Withdrawn*)

2278-91-U: Laundry and Linen Drivers and Industrial Workers Union Teamsters Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Complainant) v. Merls Pharmacy (Ontario) Limited c.o.b. as Shoppers Drug Mart (Respondent) (*Withdrawn*)

2297-91-U: Ontario District Council of the International Ladies Garment Workers' Union (Complainant) v. Briston Fashions Inc. (Respondent) (*Granted*)

2470-91-U: Labourers' International Union of North America, Local 607 (Complainant) v. Altoba Developments Ltd. (Respondent) (*Withdrawn*)

2481-91-U: Heidrun (Heidi) Babic (Complainant) v. Ontario Hydro (Respondent) (*Withdrawn*)

2482-91-U: Heidi Babic (Complainant) v. Chief Steward Div. 20-3 (Noel MacIntosh) and Acting Chief Steward (David (Dave) Trumble) (Respondents) (*Withdrawn*)

2533-91-U: Luke I. Modusen (Complainant) v. Urban Painting and Decorating Ltd. (Respondent) (*Dismissed*)

2741-91-U: United Steelworkers of America (Complainant) v. Bingo Press and Specialty Limited c.o.b. as Bazaar Novelty (Respondent) (*Withdrawn*)

3225-91-U: Penny Gallagher (Complainant) v. Local 3313 United Steelworkers (Respondent) (*Withdrawn*)

3297-91-U: Philip Gordon Oldershaw (Complainant) v. Canadian Union Auto Workers Local 707 (Respondent) (*Withdrawn*)

3523-91-U: International Brotherhood of Electrical Workers, Local Union 1687 (Complainant) v. Gorf Contracting Ltd. (Respondent) (*Dismissed*)

3671-91-U: William Curtis and Dale Allen (Applicants) v. Don Holder, John McInnes, Cecil Makowski, Gerald Estey, Canadian Paperworkers Union, Local 134, Canadian Paperworkers Union and Abitibi Price Inc. (Respondents) (*Withdrawn*)

3866-91-U: Canadian Union of Public Employees and its Local 185 (Complainant) v. Corporation of the City of Etobicoke (Respondent) (*Withdrawn*)

4070-91-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 887 (Complainant) v. Moore Corporation Limited (Respondent) (*Withdrawn*)

4089-91-U: Renley Nugent (Complainant) v. Teamsters Local Union 879 (Respondent) v. TNT/Home Delivery Services (Intervener) (*Dismissed*)

0067-92-U: Ontario Public Service Employees Union (Complainant) v. The Toronto Hospital Corporation (Respondent) (*Withdrawn*)

0302-92-U: United Food & Commercial Workers, Local 206 chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O (Complainant) v. Swiss Chalet Restaurant (Respondent) (*Withdrawn*)

0327-92-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Complainant) v. Conpour Services Ltd., Erosion Control Gabions Ltd., Hollingworth Construction Co. and Lindsay Brothers Construction (Respondents) (*Granted*)

0425-92-U: Timothy Michael O'Shea (Complainant) v. CUPE 1974 (Respondent) v. Kingston General Hospital Administration (Intervener) (*Withdrawn*)

0426-92-U: Patrick M. Pretty (Complainant) v. C.A.W. Local 1090 (Respondent) (*Dismissed*)

0524-92-U: Labourers' International Union of North America, Local 183 (Complainant) v. Galrich Contracting Limited (Respondent) (*Withdrawn*)

0539-92-U: Bruce Reilly (Complainant) v. The United Steelworkers of America (Respondent) v. GSW Inc. (Intervener) (*Granted*)

0574-92-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Randon Crane Leasing Ltd. (Respondent) (*Withdrawn*)

0605-92-U: Daniel S. Skuse (Complainant) v. United Steelworkers of America Local 1005 (Respondent) (*Withdrawn*)

0641-92-U: The Public Service Alliance of Canada (Complainant) v. The Board of Directors of Multicultural Assistance Services of Peel (Respondent) (*Withdrawn*)

0664-92-U: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the Interna-

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Merls Pharmacy (Ontario) Ltd. c.o.b. as Shoppers Drug Mart (Respondent) (*Withdrawn*)

0688-92-U: Jacklyn Whyte (Complainant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

0693-92-U: London and District Service Workers' Union, Local 220 (Complainant) v. Babcock Nursing Home (Respondent) (*Withdrawn*)

0750-92-U: John Berkelmans (Complainant) v. John Bechtel - V.P. T.C.U & Transportation Communications Union (Respondents) (*Withdrawn*)

0771-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. The Brick Warehouse Corporation (Respondent) (*Withdrawn*)

0788-92-U: London and District Service Workers' Union, Local 220 (Complainant) v. Meaford Nursing Home (Respondent) (*Withdrawn*)

0862-92-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Complainant) v. Emco Supply, Division of Emco Limited (Respondent) (*Withdrawn*)

0897-92-U: Wayne Trumble (Complainant) v. The Service Employees Union, Local 183 (Respondent) (*Withdrawn*)

0917-92-U: National Elevator and Escalator Association (Complainant) v. I.U.E.C. and its Locals 50, 90 and 96 and Messrs. McCann, Baxter, Verrege, Fitzgerald & Shaw on their own behalf & on behalf of the Union and its Locals (Respondents) (*Withdrawn*)

0940-92-U: United Food and Commercial Workers International Union, Local 633 (Complainant) v. 855436 Ontario Limited c.o.b. as Loeb Princess Street (Respondent) (*Withdrawn*)

0942-92-U: London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC (Complainant) v. Diversicare Incorporated Chelsey Park Retirement Community (Respondent) (*Withdrawn*)

0992-92-U; 0993-92-U: Felix Gerardo Redwood (Complainant) v. Modular Windows of Canada Ltd. and Architect George Blanas (Respondents) (*Dismissed*)

0994-92-U: Kulwant Randhawa (Complainant) v. PCL Packaging Ltd., Energy and Chemical Workers Union (Respondents) (*Withdrawn*)

0995-92-U: Mark Keth (Complainant) v. Christie Brown and Company (Respondent) (*Dismissed*)

0999-92-U: Leslie J. Ersser (Complainant) v. London Transit Commission & A.T.U. Local 741 (Respondents) (*Withdrawn*)

1009-92-U: Mair Saraga (Complainant) v. The Ontario Public School Teachers' Federation (OPSTF) (Respondent) (*Dismissed*)

1013-92-U: Diego Acevedo and Luis G. Montoya (Applicants) v. United Rubber, Cork, Linoleum & Plastic Workers of America AFL-CIO CLC Local 598, TEK Sign Inc. (Respondents) (*Withdrawn*)

1021-92-U: Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Complainant) v. Boonstra & Reiding Ltd., carrying on business as Boonstra Heating & Air Conditioning Ltd., Jake Bosma, Rick Boonstra and Clarence Boonstra (Respondents) (*Withdrawn*)

1070-92-U: United Electrical, Radio and Machine Workers of Canada, Local 517 (Complainant) v. The Corporation of the City of Welland and Richard Reuter and Victor Kersch (Respondents) (*Withdrawn*)

1158-92-U: United Food and Commercial Workers Union, Local 175 (Complainant) v. 822815 Ontario Limited, c.o.b. as Loeb Parkway West, Mississauga ("Loeb") (Respondent) (*Withdrawn*)

1170-92-U: Danny Tosolini (Complainant) v. Ontario Hydro Society (Respondent) (*Dismissed*)

1237-92-U: Margaret Christenson (Complainant) v. Ken Charsley, President C.U.P.E. Local 67 (Respondent) (*Withdrawn*)

1238-92-U: Margaret Christenson (Complainant) v. Doreen Hyrsky, member of Grievance Committee C.U.P.E. Local 67, Library Group. (Respondent) (*Withdrawn*)

1239-92-U: Margaret Christenson (Complainant) v. Sherry Briel, acting Chairman of Grievance Committee C.U.P.E. Local 67, Library Group (Respondent) (*Withdrawn*)

1240-92-U: Margaret Christenson (Complainant) v. Gayle Shelleau, Chairman of Grievance Committee, C.U.P.E. Local 67, Library Group (Respondent) (*Withdrawn*)

1241-92-U: Margaret Christenson (Complainant) v. Joan Zachary, Vice-President, C.U.P.E. Local 67, Library Group (Respondent) (*Withdrawn*)

1255-92-U: Ivan Frank (Complainant) v. Cara Flight Kitchen I (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO PROSECUTE

0982-92-U: The Canadian Union of Public Employees, Local 1115 (Complainant) v. The Corporation of the City of Welland (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0843-92-M: Davidson Instrument Panel Textron (Employer) v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 889 (Trade Union) (*Granted*)

0926-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. United Steelworkers of America, Local Union 5048 (Trade Union) (*Granted*)

0927-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. United Steelworkers of America, Local Union 5595 (Trade Union) (*Granted*)

0928-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. United Steelworkers of America, Local Union 2288 (Trade Union) (*Granted*)

0929-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. Local Union 917 United Transportation Union (Trade Union) (*Granted*)

0930-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. The United Steelworkers of America, Local Union 3933 (Trade Union) (*Granted*)

0931-92-M: The Algoma Steel Corporation, Limited and Algoma Steel Inc. (Employer) v. The United Steelworkers of America, Local Union 4509 (Trade Union) (*Granted*)

0932-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. International Union of Bricklayers and Allied Craftsmen, Local Union 29 (Trade Union) (*Granted*)

0933-92-M: The Algoma Steel Corporation Limited and Algoma Steel Inc. (Employer) v. United Steelworkers of America, Local Union 2251 (Trade Union) (*Granted*)

FINANCIAL STATEMENT

0500-92-M: Fred Hawara (Complainant) v. Canadian Union of Drivers and General Workers (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

2564-88-JD: 539385 Ontario Inc., carrying on business under the firm name and style of “Mev Group” (Complainant) v. Labourers’ International Union Of North America, Ontario Provincial District Council, Labourers’ International Union of North America, Local 607, Millwrights District Council of Ontario and Millwrights’ Local 1151 (Respondents) (*Granted*)

2582-91-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Complainant) v. Sheet Metal Workers’ International Association, Local 537 and E. S. Fox Limited (Respondents) (*Withdrawn*)

3430-91-JD: International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Complainant) v. Bechtel Canada Inc. and Electrical Power Systems Construction Association and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67 (Respondents) (*Withdrawn*)

0801-92-JD: Millwright District Council of Ontario, on its own behalf and on behalf of its Local 1410 (Complainant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 and The State Group (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0589-92-M: Service Employees Union Local 268 (Applicant) v. Manitouwadge General Hospital (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2157-91-OH: Nicholas Erdelez (Complainant) v. The Bentley, Metropolitan Toronto Condominium Corporation No. 596 (Respondent) (*Withdrawn*)

4096-91-OH: The Canadian Union of Public Employees and Local 1356 (Complainant) v. York University (Respondent) (*Withdrawn*)

0029-92-OH: Teamsters, Energy & Allied Workers, Local 424 (Complainant) v. Norton Advanced Ceramics of Canada Inc. (Respondent) (*Withdrawn*)

0214-92-OH: David Hewitt (Complainant) v. Stan Godziz (Elect Shift Foreman) (Respondent) (*Withdrawn*)

0329-92-OH: Joe W. Choscinski (Complainant) v. Stelco Inc. (Respondent) (*Withdrawn*)

0508-92-OH: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 103 and employee Brian Stevens (Complainants) v. Ontario Northland Transportation Commission (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2708-89-G: Millwright District Council of Ontario on its own behalf and on behalf of Local 1592, Millwrights District Council of Ontario (Applicants) v. Acco Canadian Material Handling, a division of Babcock Industries Canada Inc. (Respondent) v. Ironworkers District Council of Ontario and International Association of

Bridge, Structural and Ornamental Ironworkers, Local 700, The Association of Millwrighting Contractors of Ontario Inc. (Intervenors) (*Withdrawn*)

2709-89-G: Millwrights District Council of Ontario on its own behalf and on behalf of Local 1592 (Applicants) v. Allied Conveyors Limited (Respondent) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, The Association of Millwrighting Contractors of Ontario Inc. (Intervenors) (*Withdrawn*)

2710-89-G: Millwrights District Council of Ontario on its own behalf and on behalf of Local 1592 (Applicants) v. Adam Clark Limited (Respondent) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, The Association of Millwrighting Contractors of Ontario Inc. (Intervenors) (*Withdrawn*)

2711-89-G: Millwrights District Council of Ontario on its own behalf and on behalf of Local 1592 (Applicants) v. Comstock Canada (Respondent) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, The Association of Millwrighting Contractors of Ontario Inc. (Intervenors) (*Withdrawn*)

2712-89-G: Millwrights District Council of Ontario on its own behalf and on behalf of Local 1592 (Applicants) v. Nicholls-Radtke & Associates Ltd. (Respondent) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, The Association of Millwrighting Contractors of Ontario Inc. (Intervenors) (*Withdrawn*)

2713-89-G: Millwrights District Council of Ontario on its own behalf on behalf of Local 1592 (Applicants) v. State Contractors Incorporated (Respondent) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, The Association of Millwrighting Contractors of Ontario Inc. (Intervenors) (*Withdrawn*)

2288-90-G: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. B.J. Normand Ltd. (Respondent) (*Withdrawn*)

2739-90-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Applicant) v. Lewin Kingston, a Division of Brousseau-Robidoux Enterprises Ltd. (Respondent) (*Granted*)

0267-91-G; 0837-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jarrett Commercial Contracting Ltd., Jarrett Construction Ltd. (Respondent) (*Granted*)

1395-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Ottawa Interior System Inc. and 927893 Ontario Limited and Tristan Construction Limited (Respondents) (*Withdrawn*)

1713-91-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. Ottawa Interior System Inc., 927893 Ontario Limited and Tristan Construction Limited (Respondents) (*Withdrawn*)

1984-91-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

2849-91-G: International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicant) v. W & W Electric Inc. (Respondent) (*Granted*)

2918-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pierre Gagne Contracting Ltd. (Respondent) (*Withdrawn*)

3099-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trimen Food Service Equipment Inc. and TCS Food Service Equipment Inc. (Respondents) (*Withdrawn*)

3502-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eagle Electric, 928665 Ontario Ltd., carrying on business as Eagle-Tech., 652811 Ontario Limited, carrying on business as C.B. Electric Co. (Respondents) (*Granted*)

3591-91-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. R.J. Nicol Construction (1975) Limited (Respondent) (*Granted*)

0081-92-G: Sheet Metal Workers' International Association, Local No. 30 (Applicant) v. Independent Commissioning Services Inc. (Respondent) (*Granted*)

0088-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Kopic Wrecking Inc. (Respondent) (*Dismissed*)

0182-92-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E.S. Fox Limited (Respondent) (*Granted*)

0285-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited (Respondent) (*Granted*)

0321-92-G: Ontario Allied Construction Trades Council and its affiliate International Union of Operating Engineers, Local 793 (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; Lavern Construction Co. Ltd. (Respondents) (*Granted*)

0322-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Twinborn Construction (Paving) Ltd. (Respondent) (*Granted*)

0348-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) (*Granted*)

0410-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Regal Forming Ltd. (Respondent) (*Granted*)

0476-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Patella Construction Inc. or Patella Construction (1987) Inc. (Respondent) (*Granted*)

0477-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Denis Brisbois Contractors Ltd. (Respondent) (*Granted*)

0523-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Galrich Contracting Limited (Respondent) (*Withdrawn*)

0654-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent) (*Withdrawn*)

0661-92-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Jarrett Commercial Contracting Ltd.; Jarrett Construction Ltd. (Respondents) (*Withdrawn*)

0703-92-G: Ontario Allied Construction Trades Council and its affiliate, International Union of Operating Engineers, Local 793 (Applicants) v. Electrical Power Systems Construction Association; Ontario Hydro; Canadian Backhoe Ltd. (Respondents) (*Withdrawn*)

0729-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Magine Contractor Inc. (Respondent) (*Granted*)

0743-92-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Drycoustic Construction Ltd. (Respondent) (*Granted*)

0781-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Cool Team Mechanical Inc. (Respondent) (*Withdrawn*)

0790-92-G; 1060-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Amberland Electric (Respondent) (*Granted*)

0853-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Pre-Eng Contracting Ltd. (Respondent) (*Withdrawn*)

0859-92-G: Labourers' International Union of North America, Local 247 (Applicant) v. D. Ranieri Heritage Restoration Ltd. (Respondent) (*Granted*)

0867-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Canadian Somerset Electric Corp. (Respondent) (*Granted*)

0870-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Shadeland Masonry Ltd. (Respondent) (*Granted*)

0875-92-G: Labourers' International Union of North America, Local 506 (Applicant) v. Stephen Sura (Canada) Ltd. (Respondent) (*Granted*)

0881-92-G: Construction Workers Local No. 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Mirtren Contractors Limited (Respondent) (*Withdrawn*)

0888-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. L.A. General Contracting Ltd. (Respondent) (*Withdrawn*)

0889-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Lariano Acoustics Inc. (Respondent) (*Withdrawn*)

0902-92-G: Carpenters Local 249 (Applicant) v. Bedco Lab (Respondent) (*Withdrawn*)

0903-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Bill Bailey of Belleville Limited (Respondent) (*Withdrawn*)

0918-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. H.H. Robertson Inc. (Respondent) (*Dismissed*)

0960-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Marshall Steel (Respondent) (*Granted*)

0975-92-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Limited (Respondent) (*Withdrawn*)

0990-92-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Montgomery KONE Elevator Co. (Respondent) (*Withdrawn*)

0997-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mardave Construction Limited (Respondent) (*Withdrawn*)

1000-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

the United States and Canada, Local Union 463 (Applicant) v. Bill Bailey of Belleville Limited (Respondent) (*Withdrawn*)

1011-92-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Fahrhall Mechanical Contractors Ltd. (Respondent) (*Withdrawn*)

1016-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Formcrete Contracting Limited (Respondent) (*Granted*)

1017-92-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Aspen Interior Systems Ltd. (Respondent) (*Granted*)

1034-92-G: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CTM Ceramics International Inc. (Respondent) (*Granted*)

1045-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Gavin Construction Ltd. (Respondent) (*Withdrawn*)

1056-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Willjim Contracting & Mechanical Corp. Ltd. (Respondent) (*Granted*)

1059-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Torwest Electric Limited (Respondent) (*Granted*)

1071-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Withdrawn*)

1072-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canadian Patent Scaffolding (Respondent) (*Withdrawn*)

1073-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Verastar Forming Ltd. (Respondent) (*Withdrawn*)

1074-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. BLVD Forming Ltd. (Respondent) (*Withdrawn*)

1075-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Coldmatic (Respondent) (*Withdrawn*)

1077-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Meznic-Agena Eleetric Company Ltd. (Respondent) (*Withdrawn*)

1079-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. R.E. Wilson Electrical Contractors Inc. (Respondent) (*Withdrawn*)

1080-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. An-Dell Electric Limited (Respondent) (*Withdrawn*)

1085-92-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Quanza Roofing Ltd. (Respondent) (*Withdrawn*)

1086-92-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Master Clad Inc. (Respondent) (*Granted*)

1094-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Lapis Carpentry Inc. (Respondent) (*Granted*)

1106-92-G: Drywall, Acoustic Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Duncan Ceiling & Wall Systems Ltd. (Respondent) (*Withdrawn*)

1123-92-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canwall Drywall Contractors Ltd. (Respondent) (*Withdrawn*)

1125-92-G: Drywall, Acoustic Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Z-Tec Drywall Ltd. (Respondent) (*Withdrawn*)

1129-92-G: Marble, Tile & Terrazzo Union, Local #31 affiliated with the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Aldershot Flooring Limited (Respondent) (*Withdrawn*)

1151-92-G: International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Adelaide Electric Ltd. (Respondent) (*Granted*)

1152-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Huffman Bros. Welding Limited (Respondent) (*Granted*)

1171-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Mastercraft Bridge and Engineering Construction (Ottawa) Limited and Mastercraft Development Corporation (Respondents) (*Withdrawn*)

1182-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. G.L. Drain Inc. and G.L. Trenching Ltd. (Respondent) (*Granted*)

1195-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Sky High Forming Structural and Ornamental Iron Workers (Respondent) (*Withdrawn*)

1197-92-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Starline Cement Finishing Co. (Respondent) (*Withdrawn*)

1205-92-G: Local 200 of the Ontario Council of the International Brotherhood of Painters & Allied Trades (Applicant) v. Commercial Glass & Aluminum (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3066-83-R: D. & T. Association of Employees (Applicant) v. Bartlett Transport Ltd. (Respondent) (*Granted*)

1207-91-U: Mario Aristodemo (Applicant) v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union (Respondent) v. Heritage Clothing (Canada) Ltd. (Intervener) (*Dismissed*)

3458-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. 794852 Ontario Inc. o/a Geddes Construction (Respondent) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CA20N
LR
-054

Law
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1992



ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	J. McCORMACK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	J.B. BLOCH
	L. DAVIE
	N.V. DISSANAYAKE
	O.V. GRAY
	B. HERLICH
	R.J. HERMAN
	R.D. HOWE
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	S. LIANG
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	W.S. O'NEILL
B.L. ARMSTRONG	D.A. PATTERSON
C.A. BALLENTINE	H. PEACOCK
W.A. CORRELL	R.W. PIRRIE
K.S. DAVIES	F.B. REAUME
A.R. FOUCAULT	J. REDSHAW
W.N. FRASER	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.R. MONTAGUE	N.A. WILSON
J.W. MURRAY	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1992] OLRB REP. SEPTEMBER

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	A & L Canada Laboratories East, Inc.; Re Energy and Chemical Workers Union	983
2.	Airlift Limousine Services Limited; Re The Canadian Alliance of Airport Transportation Workers; Re Teamsters' Union, Local Union 938	985
3.	Bancliffe Contracting & Construction, 203733 Ontario Inc. (Formerly known as Bancliffe Contracting & Construction Limited) now Operating as Bancliffe Interiors, Sheldon Associates Ltd. operating as; Re C.J.A., Local 27	990
4.	Ellis-Don Limited; Re I.B.E.W. Local 105	999
5.	Metro Concrete Floors (1990) Inc. and L.I.U.N.A., Local 506; Re O.P.C.M., Local 598	1007
6.	Otis Elevator Company Limited; Re International Union of Elevator Constructors, Local 50	1013
7.	Sobeys Inc.; Re U.F.C.W., Local 1000A	1020
8.	Stephens & Rankin Inc.; Re L.I.U.N.A., Ontario Provincial District Council; Re C.L.A.C.	1049

COURT PROCEEDINGS

1.	National Plastic Profiles Inc., Ontario Labour Relations Board and; Re Steve Szeghalmi	1058
----	---	------

SUBJECT INDEX

- Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Sale of a Business - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance
- BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 990
- Adjournment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Judicial Review - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement
- ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105 999
- Bargaining Rights - Abandonment - Construction Industry - Construction Industry Grievance - Sale of a Business - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance
- BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 990
- Bargaining Rights - Adjournment - Construction Industry - Construction Industry Grievance - Judicial Review - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement
- ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105 999
- Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely
- STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. 1049

<p>Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in <i>Crete Flooring</i> case - Nothing in <i>Crete Flooring</i> suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed</p> <p>METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598</p>	1007
<p>Certification - Employer Support - Trade Union Status - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the <i>Act</i> operating to bar certification - Certification application dismissed</p> <p>AIRLIFT LIMOUSINE SERVICES LIMITED; RE THE CANADIAN ALLIANCE OF AIRPORT TRANSPORTATION WORKERS; RE TEAMSTERS' UNION, LOCAL UNION 938</p>	985
<p>Certification - Reconsideration - Employer seeking revocation of earlier certification decision on ground that it had not filed sample signatures as directed by the Board - Board weighing desirability of double-checking mechanism with necessity for expedition in certification matters - Board striking balance by requiring sample signatures, but where these are not filed in timely manner, deciding matter on evidence before it - Board declining to reconsider its certification decision</p> <p>A & L CANADA LABORATORIES EAST, INC.; RE ENERGY AND CHEMICAL WORKERS UNION.....</p>	983
<p>Change in Working Conditions - Certification - Collective Agreement - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the <i>Act</i> - Certification application dismissed as being untimely</p> <p>STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.</p>	1049
<p>Collective Agreement - Certification - Change in Working Conditions - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the <i>Act</i> - Certification application dismissed as being untimely</p> <p>STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.</p>	1049
<p>Construction Industry - Abandonment - Bargaining Rights - Construction Industry Grievance - Sale of a Business - Board applying <i>Lorne's Electric</i> case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the <i>Act</i> - Board</p>	

declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance

BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 990

Construction Industry - Adjournment - Bargaining Rights - Construction Industry Grievance - Judicial Review - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement

ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105 999

Construction Industry - Certification - Change in Working Conditions - Collective Agreement - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. 1049

Construction Industry - Certification - Pre-Hearing Vote - Representation Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 1007

Construction Industry - Construction Industry Grievance - Union alleging failure to pay wage rate of appropriate classification - Whether time spent on lay-off, while otherwise available for work, to be counted in assessing whether Helper II has completed 36 months "in the industry" within meaning of collective agreement - Board concluding that lay-off periods not to be included in such assessment - Grievance dismissed

OTIS ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50 1013

Construction Industry Grievance - Abandonment - Bargaining Rights - Construction Industry - Sale of a Business - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board

IV

declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance	
BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27	990
Construction Industry Grievance - Adjournment - Bargaining Rights - Construction Industry - Judicial Review - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement <i>res judicata</i> as a result of earlier <i>Ellis-Don</i> decision - Board finding all necessary elements of issue estoppel branch of doctrine of <i>res judicata</i> present - No cogent reason not to apply earlier <i>Ellis-Don</i> decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement	
ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105	999
Construction Industry Grievance - Construction Industry - Union alleging failure to pay wage rate of appropriate classification - Whether time spent on lay-off, while otherwise available for work, to be counted in assessing whether Helper II has completed 36 months "in the industry" within meaning of collective agreement - Board concluding that lay-off periods not to be included in such assessment - Grievance dismissed	
OTIS ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50	1013
Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal	
NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....	1058
Discharge - Intimidation and Coercion - Unfair Labour Practice - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations	
SOBEYS INC.; RE U.F.C.W., LOCAL 1000A	1020
Employer Support - Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the <i>Act</i> - Certification application dismissed as being untimely	
STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.	1049

Employer Support - Certification - Trade Union Status - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the *Act* operating to bar certification - Certification application dismissed

AIRLIFT LIMOUSINE SERVICES LIMITED; RE THE CANADIAN ALLIANCE OF AIRPORT TRANSPORTATION WORKERS; RE TEAMSTERS' UNION, LOCAL UNION 938 985

Evidence - Discharge - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... 1058

Health and Safety - Discharge - Evidence - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... 1058

Intimidation and Coercion - Discharge - Unfair Labour Practice - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations

SOBEYS INC.; RE U.F.C.W., LOCAL 1000A..... 1020

Judicial Review - Adjournment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement

ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105..... 999

Judicial Review - Discharge - Evidence - Health and Safety - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed -

Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD
AND; RE STEVE SZEGHALMI.....

1058

Natural Justice - Discharge - Evidence - Health and Safety - Judicial Review - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD
AND; RE STEVE SZEGHALMI.....

1058

Practice and Procedure - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD
AND; RE STEVE SZEGHALMI.....

1058

Pre-Hearing Vote - Certification - Construction Industry - Representation Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE
O.P.C.M., LOCAL 598.....

1007

Reconsideration - Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE
O.P.C.M., LOCAL 598.....

1007

Reconsideration - Certification - Employer seeking revocation of earlier certification decision on

ground that it had not filed sample signatures as directed by the Board - Board weighing desirability of double-checking mechanism with necessity for expedition in certification matters - Board striking balance by requiring sample signatures, but where these are not filed in timely manner, deciding matter on evidence before it - Board declining to reconsider its certification decision

A & L CANADA LABORATORIES EAST, INC.; RE ENERGY AND CHEMICAL WORKERS UNION.....

983

Representation Vote - Certification - Construction Industry - Pre-Hearing Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598

1007

Sale of a Business - Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance

BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27

990

Timeliness - Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Employer Support - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.

1049

Trade Union Status - Certification - Employer Support - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the *Act* operating to bar certification - Certification application dismissed

AIRLIFT LIMOUSINE SERVICES LIMITED; RE THE CANADIAN ALLIANCE OF AIRPORT TRANSPORTATION WORKERS; RE TEAMSTERS' UNION, LOCAL UNION 938

985

Unfair Labour Practice - Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Employer Support - Timeliness - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.

1049

VIII

Unfair Labour Practice - Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Reconsideration - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in <i>Crete Flooring</i> case - Nothing in <i>Crete Flooring</i> suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed	
METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598	1007
Unfair Labour Practice - Discharge - Intimidation and Coercion - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations	
SOBEYS INC.; RE U.F.C.W., LOCAL 1000A	1020
Witness - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal	
NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI	1058

0890-92-R Energy and Chemical Workers Union, Applicant v. A & L Canada Laboratories East, Inc., Respondent

Certification - Reconsideration - Employer seeking revocation of earlier certification decision on ground that it had not filed sample signatures as directed by the Board - Board weighing desirability of double-checking mechanism with necessity for expedition in certification matters - Board striking balance by requiring sample signatures, but where these are not filed in timely manner, deciding matter on evidence before it - Board declining to reconsider its certification decision

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *G. O. Shamanski* and *K. Davies*.

DECISION OF THE BOARD; September 17, 1992

1. This is an application for certification in which the Board issued a certificate on July 8, 1992 after the parties reached agreement on all matters in dispute and agreed to waive their right to a formal hearing.

2. Since that time however, the respondent has written to the Board indicating that it had not previously sent in sample signatures, that it was now doing so and that a Board Officer had been advised of this and had said that a certificate would not be issued until the signatures were received. The respondent asks that the Board revoke its earlier decision and re-issue a new one after completing its normal signature check.

3. Section 4 of the Board's Rules of Procedure provides, among other things, that the Registrar shall serve the respondent in an application for certification with a notice of application and of hearing in Form 4. In this case, that notice to the respondent established a terminal date of July 2nd, 1992 and contained the following paragraphs:

5. You shall send to the Board your *reply* as well as the material listed below so that:

- (a) it is received by the Board **not later** than the terminal date shown in paragraph 4; or
- (b) if it is mailed by **registered mail** addressed to the Board at its office, 4th Floor, 400 University Avenue, Toronto, Ontario, M7A 1V4, it is mailed **not later** than the terminal date shown in paragraph 4;
 - 1. A list arranged as in the Schedules attached hereto of all employees in the bargaining unit described in the application as at *June 22, 1992* the date when the applicant's application was made.
 - 2. **Documents**, from among **existing employment records**, containing signatures of the employees whose names appear on the list referred to above arranged in alphabetical order.

(emphasis in original)

4. The Board received correspondence from the respondent by registered mail on July 2, 1992 enclosing the material required by Form 4 except for the sample signatures of employees. The respondent's accompanying letter indicated that sample signatures would follow under separate cover.

5. On July 8, 1992 the parties reached agreement on all matters in dispute between them

with the assistance of a Board Officer. On July 10th, the Board sent the parties a letter confirming their various agreements in this regard which contained the following paragraph:

A written decision of the Board will issue, in the near future, bearing the waiver date of July 8, 1992.

There was nothing in the material before the Board or in the Board's letter which reflected a request or assurance along the lines the respondent has indicated.

6. A decision dated July 8, 1992 certifying the applicant was then issued to the parties with an accompanying letter dated July 15, 1992. The respondent's letter and the sample signatures were not filed until July 20, 1992. Even then signatures were not filed for all the employees listed on the employer's list, although it appears that signatures were submitted for all those included in the count. It is in these circumstances that the respondent asks us to revoke our decision and issue a new one after reviewing the sample signatures.

7. There is no doubt that the use of sample signatures is an important part of the Board's procedures with respect to membership evidence. When they are filed by an employer, they are used to compare against the signatures on membership cards to provide an additional safeguard with respect to membership evidence. However, there are cases where sample signatures are not filed as a result of unwillingness or inability on the part of an employer. When that happens, the Board cannot await the filing of the signatures indefinitely. Indeed, it is well established that expedition is crucial in labour relations matters. In *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 the Board observed as follows:

The need for expedition in labour relations matters is well recognized: *Hotel and Restaurant Employees Union v. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (C.A.); *Jordon v. York University Faculty Association* (1978) CLC ¶14,132 (Div. Ct.); *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*, (1979) 24 O.R. (2d) 400 (Div. Ct.); and, *Journal Publishing Company of Canada Ltd. et al v. The Ottawa Newspaper Guild, Local 204 et al*, (unreported, Ontario Court of Appeal, March 31, 1977) wherein Estey, C.J.O. (as he then was) observed:

In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are [sic] labour relations defeated and denied.

This is particularly so in certification cases where delay may erode or undermine the appetite of employees for collective bargaining. The effect is that delay in certification cases is measured in days, rather than in weeks or months. In recognition of this fact, the Board has developed and refined sophisticated pre-hearing procedures designed to elicit information from the parties and facilitate the disposition of applications for certification.

8. In this context, the Board must weigh the desirability of a double-checking mechanism such as sample signatures with the necessity for expedition. In doing so, it has struck a balance between these considerations by requiring sample signatures, but where they are not filed in a timely manner, deciding the matter on the other evidence before it. In arriving at this approach, the Board is cognizant of the fact that there are other safeguards associated with the membership including a verifying declaration.

9. In this case, we are not in a position to comment on the respondent's assertion with respect to any remarks made to the Board Officer, except to say that if any such request was made, it was not put before the panel. We do note, however, that the signatures were not filed until nineteen days after the date by which the respondent was directed to file them. This is a significant

period of time in the context of the expedited procedures and deadlines associated with certification applications. We also note that the parties had reached agreement on the matters contained in the Board's decision and had also agreed to waive their right to a hearing. In these circumstances, and having reviewed the sample signatures filed with the respondent's request, we are not persuaded that there is any reason to reconsider our decision of July 8, 1992.

0526-92-R; 0527-92-R The Canadian Alliance of Airport Transportation Workers, Applicant v. McIntosh Limousine Service Ltd., Air Cab Limousine (1985) Ltd., Aaroport Limousine Services Ltd., Respondents v. Teamsters Local Union 938 affiliated with the International Brotherhood of teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervener; The Canadian Alliance of Airport Transportation Workers, Applicant v. **Airlift Limousine Services Limited**, Respondent v. Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervener

Certification - Employer Support - Trade Union Status - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the Act operating to bar certification - Certification application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *Paul Falzone*, *Gurmit Singh*, *Gurdev Singh* and *Baljinder Sekhon* for the applicant; *Paulene Pasioka*, *George Agnew* and *Dan Stoikos* for the respondents on August 12, 1992; *Carl Peterson*, *George Agnew* and *Dan Stoikos* for the respondents on August 13, 1992; *no one* appearing for the intervener.

DECISION OF THE BOARD; September 15, 1992

1. These applications for certification came on for hearing together on August 12, 1992 and were scheduled to continue on August 13, 1992.
2. The respondents sought an adjournment of at least the August 12, 1992 hearing. Counsel advised the Board that the applicant had not delivered documents which the respondents had requested be produced until 4:00 p.m. on August 11, 1992 and that she had therefore not had sufficient time to review them in order to prepare for the hearing. Counsel also advised that another lawyer from her firm (Mr. Peterson) would have to attend on August 13, 1992 and that it would be more efficient if the same lawyer represented the respondents throughout. The applicant opposed the adjournment.
3. These applications were both filed on May 14, 1992. A pre-hearing representation vote was requested in each. In accordance with the Board's usual procedures in such applications, the parties met with a Board Officer (on June 3, 1992 in Board File No. 0527-92-R and on June 4, 1992 in Board File No. 0526-92-R) and, upon reviewing the Officer's pre-hearing vote meeting report and the other materials filed in each application, the Board (differently constituted) directed that a

pre-hearing representation vote be taken and the ballot box be sealed (by decisions dated June 3, 1992 in Board File No. 0527-92-R and June 4, 1992 in Board File No. 0526-92-R). Both votes were taken on June 18, 1992. Subsequently, by identical letters from counsel dated June 25, 1992 in each application, the respective respondents delivered statements of desire objecting to the manner in which the votes had been conducted and asking that they be set aside and new votes ordered. Further, by identical letters from counsel dated June 9, 1992 in each application, the respondents provided what appear to be particulars of their allegations that the applicant is not a trade union within the meaning of the *Labour Relations Act*, that the applicant is employer dominated or supported, and that the applicant "collected membership evidence as a result of misrepresentations" (and which particulars appear to have been delivered pursuant to the direction of the panel which directed the taking of the pre-hearing votes in that case, although after the time fixed therefore). It appears that it was not until July 31, 1992 that the respondents made a written demand for certain documents and that there were discussions between counsel (Mr. Peterson for the respondents) with respect thereto subsequently. It also appears that Ms. Pasieka and Mr. Peterson were aware since late June 1992 (when the notice of hearing to the parties was issued) that neither of them could attend the hearings on both August 12 and 13, 1992.

4. Upon considering the representations of the parties, the Board (orally) adjourned the hearing until 1:00 p.m. on August 12, 1992.

5. It is well understood that labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild, Local 205, OLRB et al*, [1977] 1 ACWS 817 (Ontario Court of Appeal)) and that delay in labour relations matters often works unfairness and hardship (*Re United Headwear and Biltmore/Stetson (Canada) Inc.*, (1983) 41 O.R. (2d) 287). Subject to the rules of natural justice and fairness, the Board enjoys a broad discretion to determine whether and in what circumstances proceedings before it should be adjourned. No party has a right to an adjournment for the convenience of itself or its representative (*Re Flamoro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R. (2d) 400 (Ontario Div. Court)). In recognition of the need to proceed with labour relations matters expeditiously, it is the Board's well established practice not to grant adjournments except on consent of all parties, or where the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate.

6. It appeared to us that an adjournment until the afternoon adequately balanced and protected the interests of all parties. On one hand, the respondent would have time to review the documents which had been produced in response to a request which could have been made in a more timely manner, and Mr. Peterson would not likely have been in any better position on August 13, 1992 than Ms. Pasieka at 1:00 p.m. on August 12, 1992. On the other hand, the parties would have an opportunity to consider which documents could either be submitted without formal proof or were irrelevant, and the Board would also have an opportunity to review the documents. This seemed to be an efficient use of time because it appeared likely that it would serve to reduce the amount of hearing time required to deal with the applications.

7. This is in fact precisely what happened. The parties were able to agree that all of the documents they felt were relevant could be filed and entered as Exhibits without formal proof thereof. This saved a significant amount of hearing time and the matter proceeded and was concluded within the time scheduled.

8. Upon hearing and considering the representations of the parties, the Board dismissed the applications in an oral ruling. The Board was satisfied that the applicant is a trade union within the meaning of the *Labour Relations Act*. However, the Board also found that an employer, within

the meaning of section 13 of the Act, namely the Iloda Co-operative Limited, had participated in the formation or administration of, and had provided support to the applicant, and that the applicant could therefore not be certified. Our reasons in that respect follow.

9. For the purposes of the *Labour Relations Act*, a “trade union” is defined, in section 1(1), as: “... an organization of employers that is accredited under this Act as the bargaining agent for a unit of employers; ...”. Under the Act, an organization cannot be certified as the exclusive bargaining agent for employees unless it is a “trade union”. Even if it is a “trade union” however, section 13 of the Act provides that:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code*, or the *Canadian Charter of Rights and Freedoms*.

10. In 1984, “driver” dissatisfaction with working conditions in limousine operations serving the Lester B. Pearson International Airport led some of them to approach Teamsters Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (“Local 938”). In response to this expression of interest, Local 938 mounted an organizing campaign which led to a number of applications for certification being filed in the Fall of 1984 (Board File Nos. 1489-84-R, 1490-84-R, 1491-84-R, 1492-84-R and 1549-84-R). A second series of applications were made in 1988 (Board File Nos. 1358-88-R, 1362-88-R, 1363-88-R, 1364-88-R, 1365-88-R, and 1392-88-R). Eventually, by decision dated May 17, 1989 in *Airline Limousine Services Limited*, [1989] OLRB Rep. May 395, the Board found McIntosh Limousine Service Ltd., Air Cab Limousine (1985) Ltd. and Aaroport Limousine Services Ltd. (the respondents in Board File No. 0526-92-R herein) to be one employer for purposes of the Act and certified Local 938 as the exclusive collective bargaining agent for all dependent contractors of the respondent Aaroport Limousine Services Ltd., Air Cab Limousine Services (1985) Ltd., and McIntosh Limousine Service Limited in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor. For the purpose of clarity, the Board noted the parties agreement that the term “dependent contractors” means drivers, lessee-drivers, and broker drivers. In the same decision, the Board certified Local 938 as the exclusive bargaining agent for employees of Airlift Limousine Service Limited (the respondent in Board File No. 0527-92-R herein) in a bargaining unit described in the same terms and with the same clarity note.

11. The evidence before the Board reveals that some of the drivers subsequently grew dissatisfied with the representation being provided by Local 938. They felt they could do a better job of it themselves and so, in January, 1992, formed a committee to pursue that notion. That committee, the members of which substantially overlap with the present executive of the applicant, drafted a constitution and called a meeting for the purpose of forming a new trade union. At that meeting, held on March 29, 1992, the constitution drafted by the committee was proposed, presented and adopted by those present. The meeting was adjourned and those present then signed membership cards in the applicant. The meeting was then reconvened and these members adopted a constitution again. The meeting was then adjourned to allow for broader participation in the election of officers.

12. A second meeting was held on April 11, 1992. The events of the first meeting were reviewed, those attending who had not previously become members were made members and the constitution was again presented and adopted. Officers were then elected, all by acclamation. Subsequently, the applicant made these applications to displace Local 938 as bargaining agent.

13. On the evidence before the Board, we were satisfied that the applicant is an organization of employees formed for purposes which include the regulations of employment relations between them and their employers and that it is therefore a “trade union” within the meaning of the Act.

14. However, the evidence before the Board also revealed the following. The Independent Limousine Owners Drivers Association (the “ILODA”) is an unincorporated organization which was formed in or about June 1979 in response to some perceived crisis in the airline limousine industry. The ILODA’s prime function has been to present the views of its member brokers, lessee-drivers to government agencies and the public. With the passing of the original crisis, interest in the ILODA ebbed and it became inactive until it was revived when another crisis was perceived. This pattern of activity and inactivity has marked the history of the ILODA.

15. In accordance with this pattern, the ILODA was roused to action in 1987 as a result of proposals by Transport Canada with respect to the limousine/taxi cab airport permit system which some perceived would affect the investments of brokers and lessees operating under the system then in effect. The ILODA actively lobbied in support of its members interests in that respect.

16. In addition, the ILODA’s corporate arm, the Iloida Co-operative Limited (the “Co-op”) took steps to be in a position to obtain permits with respect to the operation of a limousine service to and from Lester B. Pearson International Airport.

17. The Co-op was incorporated under the *Co-operative Corporations Act, 1973* on July 28, 1983. Although Gurmit Singh, the only witness who testified before the Board, testified that it was formed with a view to providing more economical insurance coverage to drivers, the professed objects for which the Co-op was incorporated are:

- (a) To provide and operate Limousine stands, and to acquire, maintain and operate buildings, storage houses and garages for the storage, caring for and keeping therein of Limousine and vehicles of every kind;
- (b) To rent, lease and hire automobiles of all kinds and to carry and transport passengers in the same, and generally to carry on a Limousine business;
- (c) To operate and carry on parking lots, service stations, and vehicle and motor repair shops;
- (d) To operate and provide radio dispatching and communication services;
- (e) To carry on any trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the co-operative in connection with or as ancillary to any of the above objects.

In short, the Co-op was incorporated for the purpose of engaging in the airline limousine business.

18. In 1987, the Co-op mobilized to enter the limousine business. It had a formal business plan prepared. This plan, which is dated April, 1989, proposed that the Co-op incorporate a separate company, to be managed by shareholders-limousine drivers themselves, which would operate as a separate legal entity within the Co-op’s organization. This new company (referred to in the business plan as “Air Limo”) was to apply for and obtain the requisite permits from Transport Canada, and operate a limousine ground transportation service to and from Lester B. Pearson International Airport in direct competition with existing limousine companies, including the respondents herein. In pursuit of that goal, the Co-op applied for the limousine permits which Transport Canada had proposed to issue, appeared before the Ontario Highway Transport Board

in hearings held in that respect, and received the rating of “Qualified Applicant” from that tribunal. Further, although the Co-op did not incorporate a new company, it did register “Airport Limo and Taxi Service” as a business name or style under the Co-operative Corporations Act. Although no new permits have in fact been issued to either the Co-op or to the other parties which applied for them and participated in the proceedings before the Ontario Highway Transport Board, the Co-op remains poised and ready (indeed eager) to tender on any new issue and to operate a limousine transportation business. In our view, the Co-op is an “employer” within the meaning of the *Labour Relations Act*, and specifically section 13.

19. The connection between the Co-op and the applicant is manifest. The applicant has used the offices and resources of the ILODA and the Co-op for purposes of organizing itself and its operations to date. More significant, however, is the overlap between the three entities. The documentary evidence before the Board reveals that the first and present officer’s of the applicant are:

- a) President: Gurdev Singh
- b) First Vice-President: Baljinder Sekhon
- c) Second Vice-President: Harminder Purewal
- d) Secretary: Gurmit Singh
- e) Treasurer: Surjit S. Sekhon
- f) First Trustee: Jagbir Rai
- g) Second Trustee: Vladimir Rogovsky

20. In addition to being its Secretary, Gurmit Singh was a major force in the formation of the applicant. At the same time, he is the first Vice-President of the ILODA, and a shareholder in the Co-op, which the ILODA begat.

21. The corporate documents with respect to the Co-op which are before the Board include an undated “Notice of Change” which includes particulars of the Directors and Officers of the Co-op. Although, it contains a handwritten notation that “22 July/92 - given to Jinna to file the company’s branch - (illegible initials)” there is nothing on the document or otherwise in evidence before the Board to indicate that it was filed with the Ministry of Consumer and Commercial Relations. However, it indicates that the persons listed as Directors or Officers were all elected or appointed to their positions on June 27, 1992, the same dates that certain other name persons ceased to be Officers or Directors, and well after the applicant was formed and brought these applications.

22. There is nothing in the evidence before the Board which indicates that a Notice of Change filed with the Ministry of Consumer and Commercial Relations under the *Corporations Information Act* on July 16, 1989 does not reflect who the Directors and Officers of the Co-op were at the times material to the Board’s considerations herein; namely, at the time the applicant was formed and brought these applications. This Notice of Change and the business plan dated April, 1989 both indicate that Harminder Purewal was a Director and a Secretary and that Jagbir Rai was a Director and a Treasurer of the Co-op at the time that they were elected as the Second Vice-President and First Trustee respectively of the applicant.

23. In other words, some of the same people who formed and are managing the applicant were, at the material times (and perhaps still are) Directors and Officers of either the ILODA or

the Co-op. The ILODA begat the Co-op which, though not presently active in the limousine business, desires and intends to be active and in direct competition with other employers, including the very ones with respect to which the applicant seeks certification herein.

24. In summary, the ILODA begat the Co-op and together they begat and gave support to the applicant, while at the same time the Co-op seeks entry into the limousine business. In our view, this is the sort of involvement by an employer in a trade union which section 13 of the Act is directed at. Accordingly, we were satisfied, on the evidence before the Board, that an employer, namely the ILODA Co-operative Limited, has participated in the formation and administration of the applicant and has also contributed its support to it. Consequently, section 13 operates to bar the Board from certifying the applicant herein and these applications were therefore dismissed.

4075-91-G; 4076-91-R; 4077-91-R Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Sheldon Associates Ltd. operating as **Bancliffe Contracting & Construction**; 203733 Ontario Inc. (formerly known as Bancliffe Contracting & Construction Limited) now operating as Bancliffe Interiors, Respondents

Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Sale of a Business - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the Act - Board declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance

BEFORE: *S. Liang, Vice-Chair, and Board Members F. B. Reaume and E. G. Theobald.*

APPEARANCES: *N. J. Jesin and Ucal Powell for the applicant; Sheldon Rotstein, Mel Rotstein, Edward Burkhalter and Charles Suez for the respondent.*

DECISION OF VICE-CHAIR, S. LIANG AND BOARD MEMBER, E. G. THEOBALD;
September 4, 1992

1. These matters are a referral of grievance to arbitration pursuant to the provisions of section 126 of the *Labour Relations Act*, and applications made under sections 1(4) and 64 of the Act for a declaration that there has been a sale of a business from Bancliffe Contracting and Construction Limited to Sheldon Associates, and/or a declaration that the respondents are related employers within the meaning of the Act. The grievance alleges that Sheldon has violated the Carpenters' provincial collective agreement by failing to employ members of the Carpenters for work performed at Whitney Block, Queen's Park, Toronto and other unnamed jobs.

2. No one appeared at the hearing on behalf of 203733 Ontario Inc. (formerly known as Bancliffe Contracting & Construction Limited) now operating as Bancliffe Interiors.

3. The parties will be referred to in this decision as "the Carpenters", "Sheldon" and "Bancliffe Limited".

4. There is no dispute that in 1964, a memorandum of agreement was signed between a company called "Bancliffe Construction" and the Carpenters' District Council of Toronto and vicinity on behalf of Locals No. 27, 666, 681, 1963, 3233 and 3227 of the United Brotherhood of Carpenters and Joiners of America, and that this company is the same company as Bancliffe Limited. On April 18, 1973, the General Contractors' Section of the Toronto Construction Association was accredited as the bargaining agent for all employers of carpenters and carpenters' apprentices for whom the Carpenters had bargaining rights in a defined area in the industrial, commercial and institutional sector of the construction industry. Among the employers listed as being covered by this accreditation is Bancliffe Limited. In 1986, Bancliffe Limited sold its assets to Sheldoon. The Carpenters take the position that the respondents are related employers within the meaning of section 1(4) of the Act and/or that this sale of assets constitutes a sale of a business from Bancliffe Limited to Sheldoon within the meaning of section 64.

5. The reply to the grievance referral filed by Sheldoon states, among other things:

Sheldoon Associates Ltd., a non-union contractor purchased the fixed assets of Bancliffe Contracting Ltd. in 1986. The latter had no union employees, had not done any union work in the five years previous and had no contact with the union during that period.

In the six subsequent years no union official has communicated or corresponded with the Respondent indicating any participation in a Collective Agreement.

Partway into the case, Sheldoon indicated that it was taking the position that the Carpenters had abandoned their bargaining rights from 1964 onwards. The Carpenters objected to this, noting the lack of prior notice of this position. The Board ruled orally at the hearing that having regard to the position taken in the reply, and the lack of notice as to a change in position, we would restrict the respondent's argument and evidence on the issue of abandonment to the period specified in the reply, i.e. 1981 onwards.

The Evidence

6. The Board heard the evidence of Sheldon and Mel Rotstein, Edward Burkhalter and Charles Suez for the respondents, and Ucal Powell for the applicant. Sheldon and Mel Rotstein are brothers who together operate Sheldoon Associates. Sheldoon was incorporated in July of 1986 to perform work in the construction industry. From July to October of 1986, Sheldoon was engaged in various renovation jobs using sub-contracts to trade contractors. The company at this time did not hire carpenters directly. In the fall of 1986, Sheldoon decided to buy the assets of Bancliffe Limited, which they understood to be going out of business. Through this transaction, Sheldoon became the owner of all the assets, including the equipment, trade name ("Bancliffe Contracting and Construction") and goodwill of Bancliffe Limited. In the Offer to Purchase, goodwill is allocated the majority of the purchase price in the transaction. The sale agreement also included the transfer of a customer list and the lease of the premises being used by Bancliffe Limited (although a customer list was never transferred). Sheldon Rotstein stated that Sheldoon saw the purchase of the assets as, among other things, an opportunity for Sheldoon to acquire skilled labour. At the time of sale, Sheldoon offered employment to all the skilled employees on the permanent workforce of Bancliffe Limited, whom they understood to have been employed by Bancliffe Limited for 5-20 years.

7. Sheldon Rotstein also testified that at the time of the sale, Sheldoon understood Bancliffe Limited to be operating as a non-union company. In fact, oral representations were made to that effect by the vendors. As part of the sale, Sheldoon representatives reviewed the financial records of the company, and saw no evidence of union dues deductions, remittances to union pension or welfare funds, or union wage rates being applied. In sum, nothing was said or shown to

Sheldoon at the time of the sale to indicate that Bancliffe Limited might be bound to a collective agreement with the applicant.

8. After the sale, Joe Banducci, one of the previous owners of Bancliffe Limited, worked for Sheldoon for one year as a site supervisor, supervising all of the company's on-site work. The other previous owner, John Bernardi, was employed for a period of a month in an administrative capacity. From the time of sale to the date of the grievance, Sheldoon carried on business in the construction industry, using the trade name "Bancliffe Contracting". Sheldoon submitted into evidence a Yellow Page advertisement for Bancliffe Contracting, stating "Est. 1952". All its tenders are submitted in the name of Bancliffe Contracting, save for public tenders which require a corporate name. It was also Mr. Rotstein's evidence that the trucks used by the company continue to use the name and logo of Bancliffe Contracting. Sheldoon also submitted a list of jobs performed by the company over the period from December 1990 to June 1992. This list includes approximately 160 different projects in what appear to be both the residential sector and the industrial, commercial and institutional sector of the construction industry. The description of the work covers plumbing, electrical work, cabinetry, renovations, ceiling tiles, and various other work. The customers include individuals, Queen's Park, offices, stores, theatres, a hospital, a nursing home and a bank. Only a small minority of the jobs are for individual customers.

9. Charles Suez and Edward Burkhalter are former employees of Bancliffe Limited who moved to Sheldoon at the time of the sale. Mr. Burkhalter is a cabinet-maker who spends most of his time in the shop although he does also do on-site work. Mr. Suez is a driver and also does metal stud partitions, painting, decorating and plastering. Both men testified that for at least the period of 1981 onwards and during the time they worked for Bancliffe Limited as well as Sheldoon, with one exception, they had no contact with the Carpenters. Neither was a member of any union during this period and made no dues contributions. Both testified that they worked on residential as well as commercial job sites, and were paid the same rate for both.

10. The one exception referred to above involves a discussion between Charles Suez and Ucal Powell, a business agent for the Carpenters, at the Bramalea City Centre in November of 1989. Mr. Powell testified that he had no recollection of a meeting with Mr. Suez prior to the date that he met him at Whitney Block, which resulted in the filing of the grievance. Based on Mr. Suez' evidence, we are satisfied that there was a discussion between Mr. Powell and Mr. Suez in November of 1989. Mr. Suez recalls that Mr. Powell approached him on a Sheldoon job at the Rising Sun suntan salon. Mr. Powell asked Mr. Suez what he was doing, and Mr. Suez stated that he was building a wall. Mr. Powell then asked if he was a union member, to which Mr. Suez responded that he was not, although he used to be. Mr. Suez was also asked for the name of his company, to which he replied "Bancliffe". Mr. Suez testified that when he saw Mr. Powell again, on the Whitney Block job, he reminded Mr. Powell of their previous encounter. The evidence of Mr. Suez is also that he told Mel Rotstein about meeting Mr. Powell, shortly after the discussion, and told him the nature of the conversation.

11. Although Mr. Powell cannot recall a discussion with Mr. Suez in November of 1989, he stated that it is unlikely that it occurred as Mr. Suez testified. He stated that if indeed Mr. Suez had told him he was working for a company called Bancliffe, but was not a union member, this would have triggered a grievance. He would have checked the union's list of contractors which are bound to the collective agreement, and followed up on the matter. Mr. Powell testified that Bancliffe is listed in the union's records as a contractor which is bound to the Carpenters' collective agreement. Mr. Powell testified that during the discussion with Mr. Suez at the Whitney Block job, Mr. Suez did tell him that they had met before, at Bramalea City Centre.

12. Mr. Powell also stated that the Bramalea City Centre was his first big job as a business representative. He spent a lot of time at the site, and dealt with some major problems. Mr. Powell recalls that the Carpenters had difficulty trying to persuade management at the mall to require all on-site work to be performed with union contractors, and had a number of meetings on this subject.

13. On balance, in assessing the evidence, we are satisfied that there was a discussion between Mr. Powell and Mr. Suez in November of 1989 at the Bramalea City Centre. It is possible that there was a misunderstanding and that Mr. Powell came away from that discussion without the clear understanding that Mr. Suez was a non-union employee working for a unionized company. However, even if this is so, we find that it would have been very easy for Mr. Powell to have confirmed this, either by asking Mr. Suez to show him his membership card, or by looking up Mr. Suez' name in the union's list of members. Given the interest that the Carpenters took in this particular mall and the efforts that they were making to ensure that the work performed in the mall employed members of the Carpenters, it is not unreasonable to expect that they would have made some greater efforts to verify the status of Mr. Suez and of Sheldoon, operating under the name of Bancliffe.

14. The two employees who gave evidence were not the employees of Bancliffe Limited or Sheldoon who performed the most carpentry work on site. Nevertheless, they both spent some time in work which would be covered by the Carpenters' provincial agreement. Mr. Suez estimated in his examination-in-chief that while he was with Bancliffe Limited, 40% of the work of the company was in the commercial sector. In cross-examination, Mr. Suez could not recall the names of any actual projects, although he remembered doing a "couple of stud walls" in the period before the Rotsteins hired him. Mr. Burkhalter testified that he has done both residential and commercial jobs. He as well had trouble recalling the names of many commercial projects done for Bancliffe Limited. He stated that the employees of Bancliffe Limited were engaged primarily in shop work or work on residential projects. Most of his current work is in-shop, making cabinets for homes, businesses and banks.

15. The Board also received into evidence a copy of a grievance sent to Bancliffe Limited in August of 1981. The grievance concerns an alleged failure to remit benefits on behalf of members of the Carpenters. The back of the union's copy of the grievance indicates that the company failed to reply to the grievance at step one. There is no indication that further action was taken or that the matter was settled. Mr. Powell testified that other than this grievance (and the original memorandum of settlement presumably), there is nothing in the union's files regarding Bancliffe Limited.

16. In his submissions to the Board, Sheldon Rotstein argued that there was no sale of a business from Bancliffe Limited to Sheldoon. While Sheldoon purchased assets from Bancliffe Limited, with the object of securing a labour force to give Sheldoon the capacity to perform its own construction work, the business carried on afterwards under the name Bancliffe Contracting could not have survived without the combined skills and know-how of Sheldon and Mel Rotstein. In his submission, it is they who gave life to the business, rather than the collection of assets which were purchased. In the alternative, Sheldon Rotstein asks the Board to find that there has been abandonment by the union of its bargaining rights, since there has been no evidence of any assertion of these rights over the last 11 years. The company which the Rotsteins have operated since 1986 carried on business openly as a non-union company, operating in areas covered by the Carpenters' collective agreement. The respondent relies on *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523.

17. It is also submitted that the company has been prejudiced by the delay in the assertion of bargaining rights in that the entire operations of the company have been based on it being non-union. Finally, Mr. Rotstein asks the Board to apply the principle of estoppel even if abandonment of bargaining rights is not found.

18. Counsel for the applicants points to the evidence in this case as demonstrating that what was acquired by Sheldoon in 1986 was the business of making and installing shelving. Prior to 1986, Sheldoon did not have the capacity to operate as a contractor using its own forces to perform either in-shop work or on-site installation. After the sale, Sheldoon had the physical assets, the work-force, and most importantly in counsel's submission, the goodwill of Bancliffe Limited. Counsel relies on *Doran Construction Limited*, [1984] OLRB Rep. Aug. 1108; *Ably Concrete Floor Limited*, [1991] OLRB Rep. May 579; *Gallant Painting*, [1991] OLRB Rep. Sept. 1051.

19. On the issue of abandonment, counsel submits that the factual evidence does not support a conclusion that the union abandoned its bargaining rights during the period of 1981 to 1992 relied upon. The respondent has failed to establish a list of jobs which were performed from 1981 onwards in the industrial, commercial and institutional sector. Counsel states that the collective agreement in question does not cover either shop work, or work in the residential sector. The respondent has also failed to establish whether some of its jobs were performed by union sub-contractors, and not by employees of Bancliffe. In any event, in the alternative, counsel relies on *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405 and *Culliton Brothers Limited*, [1982] OLRB Rep. March 357 and submits that the failure by a local union to apply a provincial collective agreement against a contractor is insufficient for a finding of abandonment of rights which arise under the scheme of provincial bargaining under the Act.

20. Further, it is submitted that once the Board has found a sale of a business within the meaning of section 64, a declaration must issue, with full effect from the date of the transaction. There is no discretion under section 64 to decline to issue the declaration once the finding of a sale of business is made, and there is also no discretion to limit the retroactive effect of such a declaration because of the conduct of the applicant. In this respect, it is submitted, section 64 is different from section 1(4), where the Board has on occasion exercised its discretion against issuing a declaration, or limited the retroactive effect of the declaration because of delay by the applicant in asserting its rights under the statute. Counsel referred the Board to *Tri-County Contracting*, [1991] OLRB Rep. Dec. 1416.

Decision of the Board

21. The relevant sections of the statute are as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

64. (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition and
“sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

22. The Board finds that there was a sale of a business in 1986 from Bancliffe Limited to Sheldon. The Board has long stated that there is no single or simple test that can be applied to determine whether there has been a "sale of a business" within the meaning of section 64. In general, in applying section 64, the Board looks to whether the "package" that has been transferred can be characterized as a "functional economic vehicle". The purpose of the section is to preserve bargaining rights where there has been a simple transfer of ownership with no significant change in the operations themselves. Bargaining rights would be a chimera if a change in the legal structure constituting the employer destroyed the basis of those rights.

23. In the case before us, Sheldon acquired not only all of the physical assets of Bancliffe Limited, but it also acquired the goodwill of the company, the services of its employees, and for a certain period, even the services of the former principals of Bancliffe Limited. The evidence is that Sheldon continued to carry on the same type of business as Bancliffe Limited had. There was some evidence of certain shifts in the type of work done before and after the sale. For instance, it was suggested that Sheldon did much more work in the commercial sector after the sale. We are satisfied that such a change in work is not significant for the purposes of this application. Before and after the sale, the companies in question were engaged in renovation work and in the building and installation of cabinets and shelving. In continuing with this work, Sheldon used the same physical assets, the same premises for a period of time, the same employees and the same supervision as had Bancliffe. The evidence of the Rotsteins concerning their motivation for the purchase is telling. Sheldon Rotstein candidly states that Sheldon was interested in purchasing the capacity to perform construction work "in-house". In other words, Sheldon wished to enter into the construction industry as a contractor performing work with its own forces. This it could not do before the purchase. What it gained from the purchase was a "ready-made" business.

24. The Board by no means underestimates the skills and know-how which the Rotsteins brought to the enterprise. In order for the company to have operated as it has over the past six years, the contribution of the Rotsteins was undoubtedly essential. However, at the time of the purchase, the reality is that the Rotsteins did not have the capacity to carry on the business of Bancliffe Contracting without all that it bought from Bancliffe Limited. As they have stated, they set out to purchase that capacity.

25. We thus have found that there was a sale of a business between Bancliffe Limited and Sheldon in 1986. However, a precondition for the invocation of section 64(2) is that the employer who sold the business was "bound by or is a party to a collective agreement with a trade union or council of trade unions". In this respect, it is necessary to determine whether in 1986, Bancliffe Limited was bound to the Carpenters' provincial collective agreement. Because of the position taken by the respondent in its pleadings, and our ruling at the hearing that the respondent would be confined to these pleadings in the evidence adduced and representations made at the hearing, we have no reason to question the subsistence of the Carpenters' bargaining rights as of 1978, the year that the provincial bargaining scheme under the *Labour Relations Act* came into effect. Under these provisions, these parties became bound to a provincial collective agreement bargained by designated employee and employer bargaining agents. In *Lorne's Electric*, supra, the Board discussed the effect of the province-wide bargaining provisions of the Act on an allegation that the

International Brotherhood of Electrical Workers Local 586 and 594 had abandoned their bargaining rights prior to a grievance in 1987:

• • •

20. In the spring of 1978, the Union's bargaining rights in respect of the respondent's employees in the ICI sector were being actively exercised by the Employee Bargaining Agency which, by virtue of the combined effect of the province-wide bargaining provisions of the Act and the Minister's employee bargaining agency designation dated December 12, 1977, had become their bargaining agent in that sector for the purpose of conducting collective bargaining and concluding a provincial agreement. The Employee Bargaining Agency's bargaining efforts culminated in the May 8, 1978 to April 30, 1980 provincial agreement, which was negotiated on behalf of the respondent (and numerous other employers) by the Employer Bargaining Agency. Thereafter, the Employee Bargaining Agency continued to exercise its bargaining rights in respect of the respondent's employees in the ICI sector every two years, in accordance with the province-wide bargaining provisions of the Act. The exercise of those bargaining rights gave rise to four successive two-year provincial agreements following the initial provincial agreement, the most recent of which is the aforementioned May 28, 1986 to April 30, 1988 provincial agreement.

21. Having regard to all of the circumstances, we find as a fact that there has been no abandonment of the ICI sector bargaining rights granted to Local 586 by the Board's certificate of January 5, 1977, and subsequently vested in the Employee Bargaining Agency (for the purpose of conducting bargaining and concluding a provincial agreement) by the combined legal effect of section 142 of the Act and the aforementioned employee bargaining agency designation dated December 12, 1977. In reaching this conclusion, we are not unmindful of the fact that the Union has not, prior to 1987, sought to enforce or administer the provincial agreement vis-a-vis the respondent. As indicated in *J.S. Mechanical, supra*, one of the factors which the Board has generally considered in cases involving allegations of abandonment of bargaining rights is "whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement". Where a trade union that has years earlier negotiated a collective agreement, which purports to have automatically renewed itself without any further bargaining (by virtue of a renewal provision), seeks to belatedly negotiate a new collective agreement or to raise the old collective agreement as a bar to a second trade union's application for certification, the fact that the first trade union has not for a number of years sought to enforce or administer the collective agreement by means of its grievance and arbitration provisions is clearly a pertinent factor to be considered in determining whether that trade union has in fact abandoned its bargaining rights. However, that factor is of little or no assistance in determining whether an abandonment of bargaining rights has occurred in the context of ICI sector province-wide bargaining, where the party which by law holds the bargaining rights for purposes of conducting collective bargaining and entering into a provincial agreement (i.e., the employee bargaining agency) is not the party which administers the provincial agreement at the local level. The Act's bifurcation of bargaining and administration of the provincial agreement renders an affiliated bargaining agent's failure to administer the provincial agreement vis-a-vis an employer of little or no consequence in determining whether the employee bargaining agency has abandoned its bargaining rights in respect of the employees of that employer. Even if the two-year period between rounds of province-wide bargaining were a sufficiently lengthy interval to warrant the drawing of an inference that a particular affiliated bargaining agent had abandoned the provincial agreement vis-a-vis a particular employer in its geographic jurisdiction (which, in our view, it is not), that would not preclude other affiliated bargaining agents from enforcing the provincial agreement vis-a-vis that employer in their respective geographic areas. Moreover, when the next round of province-wide bargaining occurred, the employee bargaining agency would be able to rely upon the "deemed recognition" provisions set forth in section 137(2) of the Act to assert that the employer was, for the purposes of the new round of bargaining, deemed to have recognized all of the affiliated bargaining agents represented by it, including that particular affiliated bargaining agent.

22. An argument similar in substance to that made by Mr. Touhey on behalf of the Company was considered and rejected in *Culliton Brothers Limited*, [1982] OLRB Rep. March 357, a case involving facts which are not materially different from the facts of the instant case. In doing so, the Board wrote, in part, as follows:

17. The argument that bargaining rights have been abandoned requires consideration, bearing in mind the system of centralized collective bargaining that has been in place, initially, under a system of accreditation and subsequently under a system of provincial collective agreements which are negotiated between an employer bargaining agency and an employee bargaining agency

The respondent states that it is arguing the abandonment of bargaining rights. In the Board's jurisprudence the abandonment of bargaining rights has invariably been raised either where there is clearly no collective agreement or where there is a dispute as to whether a collective agreement is in effect through a process whereby a collective agreement has renewed itself due to a failure to give timely notice under the terms of a collective agreement. In subsequent paragraphs, the Board will trace the continuation of the bargaining relationship and the series of collective agreements which came into effect and which were binding on the applicant and the respondent.

18. While the respondent states that it is arguing the abandonment of bargaining rights, in our view, such an argument is not tenable. The Board characterizes the argument of the respondent as the abandonment of collective agreements, which unknown to the applicant, the respondent, Local 47, and the [Ontario Sheet Metal and Air Handling] Group were applicable to them at various times and places. These collective agreements came into effect and were applicable to employers and trade unions beyond the immediate parties to the collective agreements by virtue of provisions of a public statute known as the *Labour Relations Act*. The application of these collective agreements under the provisions of the *Labour Relations Act* to the applicant, the respondent, Local 47 and the Group arose independently of their awareness by virtue of the operation of law. In these circumstances, the Board is not prepared to find that there has been an abandonment of bargaining rights or collective agreements.

We respectfully agree with that reasoning, and find it to be equally applicable in the circumstances of the instant case.

23. For the foregoing reasons, we find that the Union has not abandoned its bargaining rights in respect of the respondent's employees in the ICI sector.

26. Although some of the details are different as concern the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, which is the designated employee bargaining agency of the applicant, the essential facts and the statutory framework are the same. In the absence of any compelling argument from the respondent as to why the Board should decline to follow the reasons in *Lorne's Electric*, we apply those reasons. In the result, we find that as of October 1986 when there was a sale of a business from Bancliffe Limited to Sheldoon, Bancliffe Limited was bound to the Carpenters' provincial collective agreement.

27. We turn now to the question of whether the Carpenters' delay in asserting its bargaining rights should affect the remedies under section 64 of the Act or otherwise. The applicant, as stated above, takes the position that the Board cannot, in making a finding of a "sale of a business" under section 64, vary the retroactive effect of a declaration to reflect undue delay on the part of the applicant. The words of section 64 do not explicitly provide such discretion, unlike section 1(4) which states that the Board may "grant such relief, by way of declaration or otherwise, as it may deem appropriate." Section 64 does, however, contemplate that the Board may declare that a party to whom a business is sold is *not* bound by the collective agreement. The Board has considered the question of whether the power to declare that a successor employer is *not* bound a collective agreement extends beyond those specific situations provided for in subsections 64(4) to (6). In *John Lester Drugs Ltd.*, [1982] OLRB Rep. June 886; *Yesteryear Grocers Inc.*, [1982] OLRB Rep. Dec. 1975 and *G.A.C. Industries Ltd.*, [1981] OLRB Rep. June 658, the Board concluded that section 64 does not contain a general discretion to decide whether there is a flow-through of bargaining rights from a predecessor employer to a successor employer. The Board found that the provi-

sions of section 64 (2) and (3) are declaratory only. Where a sale of a business has taken place, existing bargaining rights automatically flow through, unless one of the other subsections applies.

28. We have been given no reason why we should depart from the reasoning of the Board in these above cases. Accordingly, we adopt the analysis of the Board in them, and declare that there has been a sale of a business from 203733 Ontario Inc. (formerly known as Bancliffe Contracting & Construction Limited) to Sheldoon Associates Ltd. operating as Bancliffe Contracting. Sheldoon Associates is accordingly bound by the collective agreement between the Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America.

29. Turning to the respondent's arguments that the Carpenters have abandoned any bargaining rights they may have held with respect to Sheldoon, for the same reasons expressed in paragraphs 25 and 26 above, we find that there has been no abandonment of bargaining rights under the provincial agreement between 1986 and the date of the grievance.

30. Very little argument was addressed by either party to the applicant's application under section 1(4). In our view, the evidence does not establish that the respondents are carrying on associated or related activities or business under common control and direction. The application under section 1(4) is dismissed.

31. The Board remains seized with respect to the remaining issues arising under the grievance. There are certain outstanding issues which have not been fully addressed in the arguments before us. On the facts of this case, had it not been for the provisions of the Act with respect to province-wide bargaining, this panel might well have found that the Carpenters had abandoned its bargaining rights with respect to, at the very least, Sheldoon. We find that the Carpenters knew or ought to have known of the fact that Sheldoon, operating as Bancliffe Contracting, was performing work covered by its collective agreement in complete violation of that agreement. In particular, by its conduct in November of 1989, when the Carpenters became aware of Sheldoon's existence as Bancliffe Contracting, but did nothing to assert its bargaining rights, the Carpenters have represented to Sheldoon that it did not consider Sheldoon as bound to a collective agreement. Although, as we have stated above, these facts do not in the context of a provincial agreement warrant a finding of abandonment, they may well be relevant to either the ability of the Carpenters to press this grievance, or the damages to which it is entitled. In this respect see *Steds Limited*, [1992] OLRB Rep. Jan. 67.

32. We prefer not to make a determination on this issue without the benefit of full argument from the parties. If either party wishes to pursue the remaining issues under the grievance, it will be re-listed for hearing.

DECISION OF BOARD MEMBER FRED REAUME; September 4, 1992

1. I concur in the result, but I would like to express my serious reservations with the Board's decisions that have led to it. This panel had no choice but to apply *Lorne's Electric* in this case, since no argument was presented to us as to why it should not apply. However, I believe that the application of *Lorne's Electric* results in great unfairness for contractors like Sheldoon. Eventually, the company is now bound to an agreement with a union which for at least 11 years, and maybe more, has shown no interest in representing its employees.

2. By the Board's law in this area, we are penalizing a company which has conducted business in good faith for many years with no knowledge of any possible union ties. We are also doing

nothing to encourage responsible behaviour by bargaining agents in the representation of their members.

3. Finally, I am not convinced that we should apply the rationale of provincial bargaining to maintain bargaining rights in the face of total inaction by a union, where the source of the bargaining rights is in one geographic area, and where the contractor continues to work primarily in that one area. Unfortunately, we were not presented with clear argument on this issue either.

0261-92-G; 0331-92-G; 0459-92-G; 0698-92-G International Brotherhood of Electrical Workers, Local 105, Applicant v. **Ellis-Don Limited**, Respondent; International Brotherhood of Electrical Workers, Local 773, Applicant v. **Ellis-Don Limited**, Respondent; International Brotherhood of Electrical Workers, Local 115, Applicant v. **Ellis-Don Limited**, Respondent; International Brotherhood of Electrical Workers, Local 120, Applicant v. **Ellis-Don Limited**, Respondent

Adjournment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Judicial Review - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members W. H. Wightman and K. Davies.

APPEARANCES: A. M. Minsky, John Evans and Ralph Tersigni for the applicant; R. C. Filion and Paul Richer for the respondent.

DECISION OF THE BOARD; September 21, 1992

1. All of these applications are referrals to the Board, under section 126 of the *Labour Relations Act*, of grievances in the construction industry.

2. The applicants assert that the respondent is bound to the provincial collective agreement with respect to the industrial, commercial and institutional ("ICI") sector of the construction industry in Ontario between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (hereinafter the "Electricians Provincial Agreement"). The applicants rely on the Board's decision in *Ellis-Don Limited*, [1992] OLRB Rep. Feb. 147 in that respect. The applicants assert that the bargaining rights issue is *res judicata* with respect to the respondent and the applicants herein as well and that it is therefore not open to the respondent to dispute the existence of those bargaining rights.

3. At the hearing on June 18, 1992, the respondents sought an adjournment of these applications pending the disposition of the respondent's application for judicial review of the *Ellis-Don Limited*, *supra* decision and any application for leave to appeal (to the Court of Appeal) with

respect thereto. Counsel for the respondent conceded that the Board was not obliged to grant such an adjournment. However, he submitted that there were compelling reasons for the Board to exercise its discretion to do so. In that respect, counsel advised the Board that the grounds for the application for judicial review are that the respondent was denied natural justice, and that the decision itself is patently unreasonable and wrong. Counsel submitted that the fairest and most sensible approach was to adjourn these applications as requested, and that there was no need to proceed with undue haste.

4. The applicants opposed the respondent's request for an adjournment.

5. Upon considering the representations of the parties, the majority of the Board (Board Member Wightman dissenting) denied the request for an adjournment in an oral ruling.

6. It is well understood that labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa Ltd. et al. v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, [1977] 1 ACWS 817 (Ontario Court of Appeal)) and that delay in labour relations matters often works unfairness and hardship (*Re United Headwear and Biltmore/Stetson (Canada) Inc.*, (1983) 41 O.R. (2d) 287). Subject to the rules of natural justice and fairness, the Board enjoys a broad discretion to determine whether and in what circumstances proceedings before it should be adjourned (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R. (2d) 400 (Ont. Div. Court)). In recognition of the need to proceed with labour relations matters expeditiously, it is the Board's well established practice not to not grant adjournments except on consent of all parties, or where the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate.

7. Where an application for judicial review has been made, the Board determines whether justice and the balance of convenience in the proceeding before it favour an adjournment or not. The Board is generally inclined to proceed with dispatch, but will do so only after giving due consideration to the circumstances in the particular proceeding (see, for example, *Four B Manufacturing Ltd.*, [1978] OLRB Rep. Sept. 829; *Cable Tech Wire Company Limited*, [1978] OLRB Rep. Oct. 895).

8. In this case, the parties had agreed that if the respondent's request for an adjournment was denied, they would not proceed beyond the *res judicata* issue at the hearing on June 18, 1992. The respondent conceded that if the *res judicata* argument failed the judicial review proceedings would have no impact on these applications. It appeared, to a majority of the Board, that if the *res judicata* issue was determined in favour of the applicants the situation before the Board would be crystallized, and there would be nothing to prevent the respondent from making a request for an adjournment at that point. The majority could discern no prejudice which would result to the respondent if the Board proceeded with these matters to the extent agreed to if the adjournment was denied. On the other hand, the potential prejudice to the applicants if the applications did not proceed and the *res judicata* argument failed was manifest. Accordingly, the majority determined that the request for an adjournment should be denied.

9. With respect to the *res judicata* argument, the applicants assert that these applications raise the same facts and legal issues as were in issue and determined in *Ellis-Don Limited*, *supra*. They submit that the fact that none of the applicants herein was the applicant in *Ellis-Don Limited*, *supra*, makes no difference because they are all affiliated bargaining agents of the same employee bargaining agency, and are all one and the same for purposes of the province wide collective bargaining scheme established by the *Labour Relations Act* for the ICI sector of the construction industry in Ontario. They argue that the root of the bargaining rights asserted for each of the applicants is the same as for the International Brotherhood of Electrical Workers, Local 894, their sister

Local and the applicant in *Ellis-Don Limited, supra*. The applicants submit that the determination in *Ellis-Don Limited, supra* that the respondent is bound by the Electricians Provincial Agreement should be applied in each application herein; that is, that the bargaining rights issue is *res judicata*.

10. The respondent disputes the applicants' assertions. It argues that each applicant is a separate trade union with its own distinct geographic jurisdiction. The respondent submits that this is important because in the *Ellis-Don Limited, supra*, case, evidence of what Local Unions outside of Toronto did or failed to do with respect to the critical abandonment issue was found to be irrelevant but could not be irrelevant in these applications. Accordingly, argues the respondent, the parties are different and the facts with respect to local area abandonment are different and have not been determined. Therefore, asserts the respondent, *res judicata* has no application. The respondent also argues that the *Ellis-Don Limited, supra* decision is wrong and should therefore not be applied to these applications because the Board's duty is to "get it right". The respondent conceded that the Board has the jurisdiction to apply *res judicata*, but that in the circumstances, including the *Ellis-Don Limited, supra* decision itself and the application for judicial review of it, the Board should exercise its discretion to not do so.

11. *Res judicata* is a form of estoppel. Developed by the courts, the doctrine in its modern form is based on two broad principles of public policy:

- a) that all litigation should have an end; and,
- b) that no party should be forced to litigate the same matter more than once.

The doctrine of *res judicata* operates to preclude a party or its privies from re-litigating issues (other than through an appellate process) which have been resolved by a final judgement on the merits by a court or tribunal of competent jurisdiction. In effect, such a decision creates two forms of estoppel: cause of action estoppel and issue estoppel. The essence of such an estoppel, regardless of its form, is that a specific final determination by a court or tribunal of competent jurisdiction of a right, question or fact is conclusive evidence thereof in any subsequent proceeding between the same parties or their privies (or, if the judgement is *in rem*, in any subsequent proceeding) so long as the judgement stands, unless a party otherwise bound by such a previous determination can establish that there is a fact which, if proved, would entirely change the situation and could not, by the exercise of reasonable diligence, have been previously ascertained (*Angle v. Minister of National Revenue*, [1975] SCR 248, 47 DLR (3d) 544; *Town of Grandview v. Doering*, [1975] 61 DLR (3d) 455 (Supreme Court of Canada)).

12. The Board is an administrative tribunal established by the *Labour Relations Act*. As a creature of statute, it has only such powers as have been given it by or under the *Labour Relations Act* or other legislation (like, for example, the *Occupational Health and Safety Act*). The Board has no separate or additional inherent or equitable jurisdiction. However, the Act gives the Board a considerable discretion and latitude in dealing with matters before it. Accordingly, in carrying out its functions, the Board can and does apply both legal and labour relations considerations (*Re International Union of Operating Engineers, Local 793 and Trauggott Construction Ltd.*, (1984) 48 O.R. (2d) 127 (Div. Court)); *Re Shopmans Local Union 743, International Association of Bridge, Structural and Ornamental Ironworkers (AFL:CIO:CLC) and Brayshaws Steel Ltd. et al.*, *Re Brayshaws Steel Ltd. and United Steelworkers of America*, (1972) 26 DLR (3d) 153 (Ont. Court of Appeal)).

13. While not bound to apply the doctrine of *res judicata*, the Board has applied it (or a principle analogous to it) in order to ensure that, subject to its power to reconsider, its decisions

are final and conclusive of the disputes or issues which the Board determines (see, among others, *Canadian General Electric Company Ltd.*, [1978] OLRB Rep. Apr. 384 and cases cited therein; *Napev Construction Limited*, [1980] OLRB Rep. June 862; *K-Mari Canada Limited*, [1981] OLRB Rep. Feb. 185; *Construction Association of Thunder Bay Inc.*, [1987] OLRB Rep. July 976). The Board's application of *res judicata* has been approved of by the courts (*Radio Shack*, [1979] OLRB Rep. Mar. 248, upheld at 79 CLLC ¶14216 (Ont. Div. Court) and see also 80 CLLC ¶14017 (Ont. Div. Court); *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, application for judicial review dismissed, November 3, 1981, Ont. Div. Court, unreported).

14. In this case, the respondent concedes that the Board decision in *Ellis-Don Limited, supra* is a final "judgement" for *res judicata* purposes. It concedes that the application for judicial review which has been made is not an "appeal" which would operate to stay the estoppel effect of that decision (an application for a stay of the *Ellis-Don Limited, supra* decision was subsequently made and dismissed by the Ontario Court of Justice (Divisional Court), per Steele J., by decision released on June 26, 1992). However, the respondent submits that the Board should, in the exercise of its discretion, decline to apply the doctrine of *res judicata* in this case because:

- a) there are significantly different facts which were found not to be relevant in *Ellis-Don Limited, supra* which would be relevant in these applications;
- b) the applicants herein are not privies of any party in *Ellis-Don Limited, supra*;
- c) both the process and the substance of the *Ellis-Don Limited, supra* decision are so flawed that it would be inappropriate to apply *res judicata*;
- d) if the *res judicata* argument succeeds and damages are awarded and collected, there will be no way to restore the *status quo* if the application for judicial review succeeds.

15. The Notice of Application for Judicial Review with respect to the *Ellis-Don Limited, supra* decision states that the grounds for the application are:

- (a) The Board exceeded its jurisdiction and denied the Applicant natural justice by purporting to alter a finding of fact after receiving representations from Board members who were not part of the Panel of the Board which presided at the hearing of this matter and which heard the evidence adduced and the submissions made on behalf of the parties.
- (b) The Board exceeded its jurisdiction and made a patently unreasonable error by refusing to draw an adverse inference against the Respondent, Local 894, for failing to call evidence to explain the failure of its sister Local, International Brotherhood of Electrical Workers, Local 353 ("Local 353") to include the Applicant's name on Schedule "F" to Accreditation proceedings which culminated in a decision of the Board dated January 9th, 1975.
- (c) The Board exceeded its jurisdiction and made a patently unreasonable error by finding that Local 353 and Local 894 acquired any bar-

gaining rights with respect to the Applicant as a result of the 1962 Working Agreement between the Applicant and the Building and Construction Trades Council of Toronto and Vicinity.

- (d) The Board exceeded its jurisdiction and made a patently unreasonable error in failing or refusing to find that Local 353 and Local 854 had abandoned any bargaining rights which they may have acquired in respect of the Applicant, either before or after the introduction in 1978 of the province-wide bargaining scheme in the Industrial, Commercial and Institutional Sector of the construction industry in Ontario.
- (e) The Board exceeded its jurisdiction and made a patently unreasonable error in misinterpreting and misapplying the Accreditation provisions of the *Labour Relations Act* and Regulations thereto, in relation to the issue of whether Local 353 had acquired bargaining rights with respect to the Applicant or abandoned any bargaining rights which it may have earlier acquired with respect to the Applicant.
- (f) Such further and other grounds as counsel may advise and this Honourable Court may permit.

16. In finding the respondent to be bound by the 1962 Working Agreement, the majority in *Ellis-Don Limited*, *supra* adopted and applied the analysis in *Harbridge & Cross*, [1988] OLRB Rep. Apr. 391 (application for judicial review dismissed by the Divisional Court, [1989] OLRB Rep. July 824; application for leave to appeal dismissed by the Court of Appeal, [1989] OLRB Rep. Oct. 1093), and applied the statutory scheme to the situation created by that working agreement. The majority went on to find that, on the evidence before the Board in *Ellis-Don Limited*, *supra*, there had been no abandonment of bargaining rights prior to the legislated introduction of the province-wide ICI bargaining scheme. With respect to abandonment subsequent to the introduction of provincial bargaining the majority decision adopted and applied the *Lorne's Electric*, [1987] OLRB Rep. November 1405 analysis. Counsel for the respondent took issue with the majority's conclusion in *Ellis-Don Limited*, *supra* that evidence of inactivity by International Brotherhood of Electrical Workers Local Unions outside of Toronto with respect to the ICI bargaining rights was irrelevant because such conduct could have no adverse effect on Local 894, the applicant therein. Further, counsel submitted that even if that conclusion was not wrong, it could not be correct that such evidence, or evidence of conduct subsequent to the advent of provincial bargaining, would not be relevant to the bargaining rights claimed by the applicants herein. That is, counsel submitted that there are significantly different relevant facts with respect to the abandonment issue which the respondent would seek to prove in these applications.

17. The theory of the majority of the decision in *Ellis-Don Limited*, *supra* is really quite simple:

- a) in 1962 the respondent voluntarily became bound to a "Working Agreement" with the Toronto Building and Construction Trades Council (as it then was);
- b) IBEW Local 353 was an affiliate of the Council at all material times and therefore obtained bargaining rights through the working agreement;

- c) the working agreement constituted a series of valid individual voluntary recognition agreements with each of the Council's affiliates;
- d) the conduct of other affiliates of the Council could not affect the bargaining rights obtained by Local 353;
- e) Local 353 did not abandon bargaining rights prior to the introduction of the province-wide ICI bargaining scheme was introduced into the Act (by amendments to the Act in 1977, 1978, and 1980);
- f) IBEW Local 894 obtained ICI bargaining rights with respect to the respondent with the introduction of the province-wide ICI bargaining scheme which deemed ICI bargaining held by one affiliated bargaining agent (i.e. Local 353) to also be held by all other affiliated bargaining agents (in that case, specifically Local 894) of the same employee bargaining agency;
- g) the ICI bargaining rights held by Local 353 and 894 were not affected by the conduct of any other Locals of the IBEW.

18. Sections 139, 141(1), 144, 149(2)(3) provide that:

139.-(1) In this section and in sections 137 and 140 to 154.

"affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, *represents employees* who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and *includes an employee bargaining agency*.

"bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119;

"employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union;

"employer bargaining agency" means an employers' organization or group of employers' organizations formed for purposes that include the representation of employers in bargaining;

"provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions representing terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119.

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in the definition of "sector" in section 119, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

• • •

141.-(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) despite an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

• • •

144. There an employee bargaining agency has been designated under section 141 or certified under section 142 to represent a provincial unit of affiliated bargaining agents, *all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and*, subject to the ratification procedures of the employee bargaining agency, *concluding a provincial agreement*.

• • •

149. -(2) A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, *the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency*, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119, and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

(3) Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by provincial agreement shall be considered to be a party for the purpose of section 126.

[emphasis added]

19. It is readily apparent that representation rights under the province-wide bargaining scheme in the ICI sector of the construction industry are held by both employee bargaining agencies and affiliated bargaining agents. Pursuant to section 139(1), and the designation orders themselves, employee bargaining agencies are also affiliated bargaining agents. Consequently, employee bargaining agencies hold representation rights both in their own right and as affiliated bargaining agents. Although it is the affiliated bargaining agents which deal directly with bargaining unit employees and employers in most representation matters, both employee bargaining agencies and affiliated bargaining agents have the right, and the obligation, to administer such a provincial agreement. It may be difficult to prove, but, in our view, it is conceivable that ICI abandonment can occur. In that respect, we do not read *Lorne's Electric*, [1987] OLRB Rep. Nov.

1405, or any other Board jurisprudence, as standing for the proposition that bargaining rights held under the province-wide ICI bargaining scheme can *never* be abandoned.

20. It does not appear that the respondent was precluded from pursuing either a pre or a post-provincial bargaining abandonment theory or calling evidence in support of it. Indeed, it is apparent from paragraphs 9 and 55 of the *Ellis-Don Limited, supra* decision that the Board heard evidence of conduct of affiliated bargaining agents other than Locals 353 and 894 after the introduction of provincial bargaining and representation and that the respondent pursued just such an argument. However, the majority of the Board did not accept it. To the extent that the respondent wishes to make that argument again herein, the doctrine of *res judicata*, properly applied, would prevent it from doing so.

21. We fail to appreciate how any conduct of the applicants herein, or of any International Brotherhood of Electrical Workers Local Union other than Local 353 or Local 894 which predates ICI provincial bargaining could be relevant herein. If, as the majority found in *Ellis-Don Limited, supra* and as is asserted herein, the applicants did not obtain bargaining rights until the province-wide ICI bargaining scheme was introduced, there was nothing for the applicants, or indeed any Local other than Local 353, to abandon before then. How then could evidence of their pre-provincial bargaining conduct be of assistance to anyone?

22. Finally, the applicants herein are, in our view, privies of Local 894 (and Local 353). We agree with counsel for the applicants that the province-wide bargaining scheme established by the Act vests the same rights (and obligations) in all affiliated bargaining agents. In these cases, we are unable to distinguish between Local 894 and any of the applicants herein. What Local 894 has, the applicants have. What Local 894 has been found to have is ICI bargaining rights for the respondent. So therefore do the applicants herein.

23. In the result, all the necessary elements of the issue estoppel branch of the doctrine of *res judicata* are present here. There is a final decision by the Board, by a panel of the Board with the jurisdiction to make it, which has determined that the respondent is bound by the Electricians Provincial Agreement with respect to the ICI sector of the construction industry by which Local 894 and its privies, which include the applicants herein, are bound. The determination of that issue was fundamental to that decision and would have been equally binding on Local 894 and the applicants herein had it gone the other way. Nor is there any relevant evidence or argument which respondent either did not advance, or did not have the opportunity to advance, in *Ellis-Don Limited, supra*, or which was unavailable to it at the time.

24. Finally, we are not persuaded that there is any cogent reason not to apply the *Ellis-Don Limited, supra* decision in these applications notwithstanding that the preconditions for the application of the doctrine of *res judicata* exist in that respect.

25. First, we do not sit on an appeal or in review of the majority decision in *Ellis-Don Limited, supra* in these applications. For the Board to decline to apply that decision herein, we would, in our view, have to be satisfied that that decision is clearly wrong. We are not persuaded that the majority decision in *Ellis-Don Limited, supra* is wrong, either clearly or at all.

26. Second, the respondent's "*status quo* or irreparable harm" argument is premature. Any prejudice to the respondent would result, if at all, from an award and payment of damages, not from an application of the doctrine of *res judicata*.

27. In the result, we are satisfied that the preconditions for the application of *res judicata* exist, and that there is no cogent reason to not employ it by applying the majority decision in

Ellis-Don Limited, supra in these applications. We therefore find that the respondent is precluded from contesting the applicants' assertion that it is bound by the Provincial Collective Agreement in effect at the material times between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, and the International Brotherhood of Electrical Workers and IBEW Construction Council of Ontario in these proceedings because that issue is *res judicata*.

28. If the respondent wishes to request an adjournment at this point, it should so advise the Board, in writing and together with its complete written submissions in support of its request, within 14 days of the date hereof; failing which the Registrar will schedule the applications for hearing for the purpose of hearing the evidence and representations of the parties with respect to all matters arising out of or incidental to the grievances herein which remain to be determined.

PARTIAL DISSENT OF BOARD MEMBER W. H. WIGHTMAN: September 21, 1992

As noted at paragraph 5 of the majority decision I would have accepted submissions by counsel for the respondent and granted the requested adjournment and so indicated at the time of the oral ruling.

0054-92-U; 0068-92-R Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Complainant v. Labourers International Union of North America, Local 506 and **Metro Concrete Floors (1990) Inc.**, Respondents; Labourers' International Union of North America, Local 506, Applicant v. Metro Concrete Floors (1990) Inc., Respondent v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Intervener

Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

DECISION OF THE BOARD; September 3, 1992

1. By decision given orally at the hearing on June 17, 1992 and in writing, with reasons, on June 29, 1992 (the "first decision") the Board dismissed the complaint in Board File No. 0054-92-U, dismissed the challenges with respect to Manuel Garcia and Jose Gomes in the certification application in Board File No. 0068-92-R, and directed that a hearing be scheduled to deal with the remaining matters in dispute in the application.

2. By letter from counsel dated July 28, 1992, the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, ("Local 598") seeks reconsideration of the first decision. Further, and in the alternative, Local 598 seeks reconsideration of the decision (by a differently constituted panel of the Board) dated April 30, 1992 (the "second decision") regarding the voter eligibility determination therein.

3. Local 598 specifically does *not* seek reconsideration of the dismissal of the complaint in Board File No. 0054-92-U as against the Labourers' International Union of North America, Local 506 ("Local 506"). Its request for reconsideration is limited to that part of the first decision dealing with the complaint as against Metro Concrete Floors (1990) Inc. ("Metro"). Local 598 refers to *Maplehurst Hospital Limited*, [1986] OLRB Rep. Feb. 247; *Craftline Industries Limited*, [1977] OLRB Rep. Apr. 246 and *Comstock Funeral Home Ltd.*, [1981] OLRB Rep. Dec. 1755, and submits that the Board erred in drawing the inferences it did in the first decision. Local 598 argues that the fact that the settlement referred to does not include compensation for lost wages suggests nothing about whether the individuals concerned would have been working on the material dates but for what it asserts were Metro's unfair labour practices. Local 598 argues that:

In this regard, it is pertinent to note that at the time the settlement was entered into, the employer was aware that Local 598 had challenged the terminal date list on the basis that Gomes and Garcia would have worked on the terminal date but for the employer's unfair labour practices (see Pre-Hearing Vote Report). There is nothing in the settlement to suggest that Local 598 was abandoning its position on the list. Looking at the settlement on its face, the most that can be said is that the parties agreed, for reasons unknown, that no compensation in respect of the past would be provided. The employer does, however, acknowledge on the face of the settlement that the failure to employ Garcia and Gomes was in violation of the collective agreement. Contrary to what the Board inferred, this admission suggests that Garcia and Gomes would have been employed on April 16, 1992 (the terminal date) in the ordinary course of events.

Local 598 submits that the Board erred in that it improperly went behind the grievance settlement and drew an insupportable inference which was fatal to its position. Local 598 points out that sections 91 and 126 of the *Labour Relations Act* serve different purposes and invite distinct remedial responses. It submits that the Board failed to take into account these distinctions and Local 598's pleadings in that respect.

4. In the second decision, the Board determined who would be eligible to vote in the pre-hearing representation vote requested by Local 506 as follows:

8. Having regard to the above, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All construction labourers in the employ of Metro Concrete Floors (1990) Inc.:

- (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and
- (ii) in all other sectors of the construction industry, save and except the industrial, commercial and institutional sector in O.L.R.B. Board Area #8;

save and except non-working foremen and persons above the rank of non-working foreman, employees for whom bargaining rights are already held by the Applicant and/or any other affiliated bargaining agent of the designation of The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council and employees covered by the subsisting collective agreement between the Applicant and the Respondent.

Clarity Note

For the purpose of clarity, the Board declares that employees of the Respondent engaged in cement finishing and waterproofing are included in the bargaining unit.

Local 598 concedes that this decision reflects the Board's normal practice at the time but points to the decision in *Crete Flooring Group Limited*, [1992] OLRB Rep. July 792 in which the Board reviewed that practice and determined that it ought not apply in the construction industry. Local 598 also refers to *Country Masonry Inc.* (Board File No. 0401-92-R, May 6, 1992, unreported) in which the Board adopted the *Crete Flooring Group Limited*, *supra*, analysis and voter eligibility rule. Local 598 argues that the same "law" should apply to the application herein, which application was filed after the one in *Crete Flooring Group Limited*, *supra* but before the one in *Country Masonry Inc.*, *supra*.

5. Local 506 and Metro responded by letters (from counsel) dated August 10 and August 12, 1992 respectively. Local 506 submits that Local 598's request for reconsideration should be dismissed because Local 598 was adequately represented at the hearing and advances no new evidence or argument which was not available to it at that hearing. Local 506 refers to *Metropolitan Separate School Board*, [1974] OLRB Rep. May 318 and *Lorain Products (Canada) Ltd.*, [1978] March 262 in that respect and submits that Local 598 should not be allowed to repair the deficiencies in its case or to reargue it.

6. In the alternative, Local 506 submits that the request for reconsideration should be dismissed on its merits. Local 506 argues that Local 598 has misstated or misinterpreted the first decision in that the Board did properly consider its pleadings, drew the appropriate inferences and made the appropriate findings. Further, Local 506 submits that the Board correctly refused to proceed with the complaint herein because it could not, as the Board found, have any impact on the application for certification.

7. Local 506 submits that the request for reconsideration of the second decision ought to be denied as well because the parties have conducted themselves and joined issue on the matters in dispute between them on the basis of the voter eligibility rules in effect prior to the *Crete Flooring*, *supra*, decision and because the vote has been taken (though not counted) in this case.

8. Metro submits that "the request for reconsideration is directed at the 'competition' between Local 598 and Local 506 to represent employees of the respondent company" and takes no position in that respect. Metro does, however, submit that the requests disclose no new evidence or arguments which could not have been placed before the Board at the hearing on June 17, 1992 and that they should therefore be dismissed.

9. Section 108(1) of the *Labour Relations Act* provides that:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Under it, the Board has a broad discretion to reconsider any of its decisions. However, the same provision and practical labour relations considerations require the Board to operate from the premise that a Board decision should be final conclusive for all purposes unless there is a cogent reason to change it. Accordingly, the Board will not usually reconsider a decision unless an obvious error has been made; or a request for reconsideration raises important policy issues which have

not received adequate attention or consideration; or the party requesting reconsideration proposes to adduce new evidence which it could not, with the exercise of due diligence, have obtained and adduced previously, and which new evidence would, if accepted, have a material impact on the decision in question; or that a party seeks to make representations which it has had no previous opportunity to make (see Board Practice Note #17).

10. In this case, Local 598 had a full and fair opportunity to make representations to the Board with respect to the matters determined in both the first and second decisions. Indeed, it does not assert that it did not. Further, it advances no argument or allegation of fact which it did not make or have the opportunity to make at the hearing on June 17, 1992. Nor is Local 598's two part request for reconsideration based on any obvious error in either decision.

11. It is (or should be) patently clear from the first decision that the Board considered *all* of Local 598's pleadings. Indeed, Local 598's pleadings are quoted at length in paragraphs 2, 8 and 18 of the first decision.

12. In coming to the first decision, we were mindful of the differences between arbitral (section 126) and unfair labour practice (section 91) proceedings. The Board's "deferral to arbitration" jurisprudence (see, for example, *Valdi Inc.*, [1980] OLRB Aug. 1254; *The General Hospital Port Arthur*, [1986] OLRB Rep. Sept. 1218) illustrates the distinctions between them. We note, however, that these distinctions are somewhat muted where, as here, the Board is also the arbitrator.

13. The cases cited by Local 598 in support of its request for reconsideration of the first decision provide little support for it. In paragraph 5 of *Craftline Industries Limited*, *supra*, the very paragraph cited by Local 598, the Board stated that evidence with respect to matters which had been previously settled or withdrawn would be admitted "... for the limited purpose of establishing a pattern of unlawful activity and *not for the purpose of gaining redress for the alleged unlawful activity* (emphasis added)." In *Comstock Funeral Home Ltd.*, *supra*, the reasoning of which *Maplehurst Hospital Limited*, *supra*, adopted and applied, the Board ruled that evidence of matters raised and complaints which had been settled were admissible in "... a fresh complaint *arising from subsequent events* ..." (emphasis added). It is clear from the Board's decision in *Comstock Funeral Home Ltd.*, *supra*, that the Board ruled that no relief could be obtained with respect to the events which were the subject of the previously settled complaints.

14. It was (and is) obvious on the face of the complaint herein that it was not a fresh one "arising from subsequent events". Even as amended by letters which post-date the settled grievance (but predate the settlement itself), it raises substantially the same matters as were raised in the grievance settled by the May 11, 1992 Memorandum of Agreement and disposed of by the May 25, 1992 Board decision in Board File No. 0158-92-G. The grievance alleged that Metro had failed to employ duly appointed stewards of Local 598 and had to employ persons who are members in good standing of Local 598, and sought, among other things, full monetary compensation arising out of the alleged failures to hire. In the complaint herein, Local 598 made the same allegations (in different words) and sought the same relief (among other things). Indeed, it was the only relief of substance which was left once the section 13 allegations were dismissed (with respect to which Local 598 does not seek reconsideration).

15. Nor did the Board go behind that settlement or the Board decision. On the contrary, the Board specifically ruled (in paragraph 17 of the first decision) that it would not permit Local 598 to do so. In determining the issue placed before the Board in that respect, we had to interpret and apply that settlement. In effect, Local 598 sought, and still seeks, to have the Board inquire into and award relief with respect to the very matters which were the subject of the grievance and settlement in Board File No. 0158-92-G. Local 598 seeks to rely upon Metro's admissions in the

settlement agreement while at the same time it argues that the Board should not have applied and drawn inferences from the rest of it. Local 598 cannot have it both ways. We are satisfied that Local 598 should be held to the settlement it made, and that we drew the appropriate inferences from it.

16. This left only the allegations in paragraph 2 to 6 and 8 of the complaint as originally filed. In paragraph 18 of the first decision, we thought it appropriate to exercise our discretion to not inquire into those. There is nothing in Local 598's reconsideration submissions which causes us to think we should have done otherwise. Indeed, we note that the pleadings in paragraphs 2 to 4 refer to proceedings with respect to an earlier grievance which was also referred to the Board in Board File No. 4063-91-G. That grievance was disposed of by the Board by decision dated April 2, 1992 (unreported) on the basis of a Memorandum of Agreement between Local 598 and Metro dated March 26, 1992 (although Local 598 pleaded that this Memorandum was entered into on April 2, 1992). On its face, Local 598's April 9th grievance covers the allegations made in paragraphs 5 and 7 of its complaint. In our view, these pleadings even if they could sustain a finding that Metro had breached section 65, 67 or 71 as alleged (which we doubt), should probably have been dismissed as covering the same matters settled and disposed of by the Board in Board File Nos. 4063-91-G and 0158-92-G.

17. This left paragraphs 6 and 8 standing alone. Paragraph 6 relates to the allegation that two Local 506 organizers were at a Metro job site. There is not even an allegation that they were there at the instance of Metro, or any assertion as to how this constituted a violation of the Act by Metro. That is not the sort of thing which another party, or the Board, should have to guess at. Everyone is entitled to know, with particularity, precisely what is being alleged. Quite apart from the absence of particulars, this allegation could not affect Local 506's entitlement to the representation vote it had requested since the section 13 complaint had been dismissed. The same is true for the allegation in paragraph 8. Further, Local 598 has never alleged, in a timely way or otherwise, that the conduct alleged in paragraphs 6 or 8, or anything else, has tainted or otherwise affected the reliability of the representation vote taken on May 14, 1992. That being the case, we were (and are now) unable to discern what labour relations or other legitimate purpose could be served by inquiring into that allegation. To the extent that there is a representation issue which transcends the arbitration proceedings before the Board, it remains to be disposed of. We remain of the view that the determination of that issue could not be affected by an inquiry into what was left of Local 598's complaint and that to do so would serve no useful purpose. We remain of the view that it was appropriate for us to exercise our discretion in that respect in the way that we did in the first decision (at paragraph 18).

18. In the result, we decline to reconsider our June 17, 1992 oral or June 29, 1992 written decision as requested by Local 598 and that request is dismissed. However, we do wish to amend the June 29, 1992 by:

- a) amending the title of Board File No. 0054-92-U by inserting the word "and" between the words "Local 506" and "Metro" and adding an "s" to the word respondent, and the title of Board File No. 0068-92-R by adding "Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598" as an intervenor;
- b) amending the Board File No. reference in the last line on page 15 from "0068-92-2" to "0068-92-R";

- c) deleting the letter “s” from the end of the word “grievances” in the fourth line on page 16;
- d) inserting the word “is” between the words “grievance” and “dated” in the fourth line on page 16;
- e) dismissing the allegations in paragraphs 2 to 5 and paragraphs 7 of the complaint for the reasons given herein, in the alternative to exercising our discretion to not inquire into them.

19. The second aspect of the applicant’s request for reconsideration (that is, with respect to the second decision) must also fail.

20. On July 17, 1992, the Board issued the following notice to the community:

July 17, 1992

NOTICE TO THE COMMUNITY

The attention of the community is directed to the Board’s recent decision in *Crete Flooring Group Limited* (decision dated July 8, 1992, not yet reported, Board file number 4150-91-R). In *Crete Flooring*, the Board reconsidered its customary practice with respect to voter eligibility in construction industry certification applications.

The Board concluded that dual voter eligibility dates in the construction industry are not appropriate. It determined that establishing a *single* date (being the application date) was the more appropriate practice.

Accordingly, in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit (“voting constituency” in pre-hearing applications) on the application date.

21. There is nothing in this notice, or the *Crete Flooring Group Limited, supra*, decision, which suggests that the “new” practice will be applied to applications for certification in which, as here, a representation vote has already been taken, whether or not the ballots have been counted. Nor are we aware of any case in which it has been so applied.

22. As Local 506 has submitted, the application for certification has proceeded and the parties have joined issue on the matters remaining in dispute between them on the basis of the pre-*Crete Flooring Group Limited, supra*, voter eligibility rules. Further, Local 598 is a party in the *Crete Flooring Group Limited, supra*, proceedings (and was represented by the same counsel as in this case), and was aware at the time that this matter came on for hearing on June 17, 1992 that the Board’s voter eligibility practice had been placed in issue (by Local 506, the applicant in that case as well) and was being revisited by the Board in that case. In our view, Local 598 could have, and should have, raised the second aspect of its reconsideration request at or before the June 17, 1992 hearing herein.

23. Further, the reasons for the change in practice, as articulated in *Crete Flooring Group Limited, supra*, (with which reasons we agree) do not exist here. Nor are we persuaded that it is unfair or prejudicial to Local 598 to proceed in accordance with the second decision. Indeed, to reconsider that decision in the way Local 598 requests would be to allow the kind of conduct, in the circumstances of this case, which the new practice is intended to avoid.

24. In the result, Local 598’s requests for reconsideration are dismissed. However, the Board does find it appropriate to amend its decision as set out in paragraph 18 above.

1298-92-G International Union of Elevator Constructors, Local 50, Applicant v. Otis Elevator Company Limited, Respondent

Construction Industry - Construction Industry Grievance - Union alleging failure to pay wage rate of appropriate classification - Whether time spent on lay-off, while otherwise available for work, to be counted in assessing whether Helper II has completed 36 months "in the industry" within meaning of collective agreement - Board concluding that lay-off periods not to be included in such assessment - Grievance dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *F. B. Reaume* and *P. V. Grasso*.

APPEARANCES: *B. Chercover*, *C. Murray*, *P. Verrege*, *S. Heaton* and *J. Hickson* for the applicant; *M. Patrick Moran*, *Andy Reistetter*, *Andy Jensen* and *Ed Wyzykowski* for the respondent.

DECISION OF THE BOARD; September 30, 1992

1. This is an application pursuant to section 126 of the *Labour Relations Act*.
2. With respect to two grievors, Stephen Heaton and John Hickson, the union grieves that the employer has breached article 10.06 of the collective agreement, in its refusal to pay the grievors the wage rate of the appropriate classification. More particularly, the union alleges that the grievors were properly classified by the union as Improver Helpers, and were therefore entitled to be paid at that level, according to the provisions of article 10.06, which sets the wage rates for Improver Helpers at eighty per cent of the Mechanic's rate. The employer refused to pay Heaton and Hickson as if they were Improver Helpers, thereby (alleges the union) breaching the collective agreement.
3. The parties are bound by a province-wide collective agreement, between the Employer Bargaining Agency, the National Elevator and Escalator Association, and the Employee Bargaining Agency, the International Union of Elevator Constructors, binding the elevator companies and elevator unions in the province. The genesis of the province-wide agreement was an interest arbitration award issued in the mid-1970's. While the parties have been free in successive rounds of negotiation to change that imposed agreement, many of the initial provisions remain unaltered in the current collective agreement. Under the agreement, seniority is industry wide. Employees can accumulate seniority and progress through the different levels of experience through working for different employers. The appropriate local union operates a hiring hall, or job referral list, to which employers must turn as a first source of obtaining employees (Article 10.13). Generally speaking, there is nothing in the collective agreement restricting the manner in which the union operates the hiring hall or referral list. The collective agreement does set out a classification system for employees, establishing a progression through different job classifications with increasing pay rates, beginning with "Probationary Helper I", progressing through other "Helper" levels, and ending with "Mechanic". The dispute here is over the conditions that must be met in order for an individual to progress from Helper II to Improver Helper.
4. The provisions of the collective agreement are complicated and are not like more typical agreements, reflecting the special nature of the elevator industry and its multi-employer province-wide seniority system, and the fact that the overall structure was imposed through interest arbitration. The operation of the job classification system can best be understood in the context of the entire scheme. The applicable provisions read as follows:

ARTICLE 10

TRAINING-QUALIFICATION-EMPLOYMENT

-LAYOFF-RECALL

10.01 It is agreed by the Union that there shall be no restrictions placed on the character of work which a Helper may perform under the direction of an Elevator Constructor Mechanic. (However, a Helper on Maintenance work is subject to the provisions of Article 9).

10.02 The total number of Helpers employed shall not exceed the number of Elevator Constructor Mechanics on any (1) job, except on jobs where two (2) teams or more are working, one (1) extra Helper may be employed for the first two (2) teams and an extra Helper for each additional three (3) teams.

Further, the Employer may use as many Helpers as best suits his convenience under the direction of a Mechanic in wrecking old plants and in handling and hoisting material; and on foundation work. When removing old and installing new cables on existing elevator installations, an Employer may use two (2) Helpers to one (1) Mechanic.

10.03.01 PROBATIONARY HELPER I: A newly hired employee without elevator experience shall be classified as a probationary employee in the status of Probationary Helper I for a period or periods totalling six (6) months within the aggregate period of not more than nine (9) months.

The probationary period may be worked with more than one Employer. He shall be at least 18 years of age, physically fit and possess a high school certificate or its equivalent education. He shall receive 55% of the Mechanic's rate.

10.03.02 PROBATIONARY HELPER II: Upon completion of six (6) months in the industry, to the satisfaction of the Employer and the Union, a Probationary Helper shall be re-classified as a Probationary Helper II. For further advancement in the industry, he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available.

10.03.02 [sic] He shall receive 60% of the mechanic's rate and shall be entitled and be required to participate in and make contributions to the Welfare Plan and the Pension Plan as provided for in this Agreement. He shall also be entitled to enroll in the Canadian Elevator Industry Educational Program. The Trustees of the Plans and the Program shall be requested to make any and all amendments or arrangements necessary to accomplish this.

The Employer and the Union shall have the privilege of testing the ability of a Probationary employee during this twelve (12) month period. If they agree that the employee during this probationary period does not display sufficient aptitude to become a Helper he shall be discharged. No such discharge shall be construed as a grievance by either party.

10.04 HELPER I: Upon completion of twelve (12) months in the industry the employee will be re-classified as a Helper I. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available.

The Helper I, shall remain in this classification for a further twelve (12) months in the industry. He shall receive 70% of Mechanic's rate.

10.05 HELPER II: Upon completion of twenty-four (24) months in the industry the Helper I shall be re-classified as a Helper II. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available. Courses are modules 1 to 7 and 15 of the C.E.I.E.P.

He shall receive 75% of Mechanic's rate. The Helper II, shall remain in this classification for a further period of twelve (12) months in the industry.

10.06 IMPROVER HELPER: Upon completion of thirty-six (36) months in the industry, a Helper II shall be re-classified as an Improver Helper. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available. Courses are modules 1 to 8 and 15 of the C.E.I.E.P.

The Improver Helper shall remain in this classification for a further period of twelve (12) months in the industry. He shall receive 80% of Mechanic's rate.

10.07 MECHANIC: Upon completion of forty-eight (48) months in the industry and successful completion of the C.E.I.E.P., an Improver Helper shall write the Mechanic's exam as set out by the C.E.I.E.P. Trustees. Examinations shall include modules 1 to 8 and 15 of the C.E.I.E.P., plus questions on the Canadian Elevator Code, Print Reading, Hydraulics and Escalators.

A Mechanic's exam shall be administered at least once every twelve (12) months in each local in Ontario.

10.08 The "recognized courses of training" above, include compulsory tests which must be passed to advance to the next classification. Failure at any level in the progression will result in loss of advancement in the industry. If the test is failed once the Helper shall re-apply to write the test again after six months, but before twelve months.

A Helper who fails the test twice at the same level will be reduced to and paid as a Helper I. A Joint Education Committee shall be appointed consisting of three representatives from the Employers and three Representatives from the Local Union. This committee shall develop and periodically up-date standardized Helpers and Mechanic's exams under the direction of the National Board of Trustees of the C.E.I.E.P.

No Helper may qualify to be raised to the next classification until he has worked the prescribed periods and passed the examinations administered by the Joint Education Committee.

The periods mentioned in the foregoing shall be aggregate periods and may be worked with more than one Employer.

10.09 TEMPORARY MECHANIC: Shall mean the Improver Helper who may be raised to the status of Temporary Mechanic under Agreement of his Employer and the Union Representative.

If an Improver Helper is raised to the status of Temporary Mechanic he may remain as a Temporary Mechanic as long as satisfactory to the Employer and the Union, provided that there are no Mechanics unemployed.

Helper II and then Helper I may be raised to Temporary Mechanics, provided that all Improver Helpers are working as Temporary Mechanics, under Agreement of the Employer and the Union.

10.10 An individual with previous elevator experience may be hired as a Helper or Mechanic by agreement with the Union and the Employer.

10.11 A Joint Employment Committee comprised of an equal number of employer representatives from the industry and from the Local Union shall be appointed in each locality.

10.12 The primary purpose of the Committee shall be to establish and keep current an open list of individuals who are fully qualified to perform the work required in the industry, or who are being trained in the work of the industry, or who have apparent potential for such training. This open list shall be established and kept current on a non-discriminatory basis and without regard for membership in the Union. The Joint Employment Committee (co-ordinating its work with the Education Committee, the joint Examining Committee and with governmental and outside

agencies as it deems advisable), shall develop policies and procedures designed to attract and retain a competent and stable workforce in the industry.

10.13 An Employer shall use the Local Union as a first source of job applicants. In the event that the Local Union is unable to satisfy satisfactorily the Employer's request within three (3) working days, the Employer may obtain applicants from any other available source. Before commencing work such applicants will obtain a referral slip from the Local Union which shall be granted by the Local Union. The Employer has the right to reject any applicant referred to him by the Local Union, however, a claim that the Employer has unreasonably rejected such an applicant may be the proper subject matter of a grievance.

10.14.01 Seniority of an Employee is his total length of service in the industry in Ontario.

10.14.02 Seniority shall not be broken, but shall not accumulate while an Employee is on lay-off, or is on an official leave of absence, or if he is promoted to a Supervisory position (Supervising Bargaining Unit Employees), or a member working with other than the same Employer outside the Province of Ontario.

10.14.03 Seniority shall be maintained and shall accumulate while an Employee is sick and is covered by the Welfare and Pension Plans, or is disabled and is on Workmen's Compensation Benefits and is receiving weekly benefits, or is assigned to work for the Employer outside the Province of Ontario, or is a Union Representative elected or appointed, during the term of office, or is a Union member working as a Supervisor, or a Union member appointed as Director of the Education Plan, or is on lay-off and working for the same Employer outside the Province of Ontario.

10.14.04 Seniority shall not be deemed to be broken, or may be deemed to accumulate if the Joint Employment Committee agrees that any circumstances not covered by this Article shall not be grounds for breaking an Employee's seniority.

An Employee who is on lay-off and is not available on recall to work in the industry may be deemed to have broken his seniority by the Joint Employment Committee.

10.15 In the event that lack of work requires a reduction in the number of employees in the employ of an employer, employees shall be laid-off in the following order:

- (a) Probationary Helpers I, without regard to seniority. (First block to be laid off.)
- (b) Probationary Helpers II, without regard to seniority. (Second block to be laid off.)
- (c) Helper I, without regard to seniority. (Third block to be laid off.)
- (d) Helper II, without regard to seniority. (Fourth block to be laid off.)
- (e) Improver Helpers without regard to seniority. (Fifth block to be laid off.)
- (f) Mechanics in seniority, provided the Employers remaining Mechanics have the necessary skill and ability to do the work that remains.

Any Mechanic in the Employer's workforce, affected by a lack of work, may accept assignment to Improver Helper, or take a lay-off.

Assignments of this nature shall not be used as a disciplinary measure and will only be made as a result of a reduction in the Employer's workforce.

Such assignments shall not be prejudicial to the Mechanic and will not affect his classification of Mechanic for lay-off purposes.

There shall be no industry-wide bumping except that Mechanics may bump Temporary Mechan-

ics and Probationary Helpers on an industry-wide basis. Helpers may bump Probationary Helpers on an industry-wide basis.

Notwithstanding the foregoing provisions of 10.15 an employee has no seniority rights with an Employer for a period of six (6) months after commencing work with that Employer. After the six (6) month period, full seniority rights will be credited with the new Employer. In the event of a reduction in the workforce with that Employer during the six (6) month period this employee will be the first to be laid-off with the exception of Probationary Helpers.

10.16 The recall rights of employees laid off by an Employer (or Mechanics assigned to the Improver Helper rate) shall be in the reverse order of the lay-offs made in accordance with this Article. The Employer shall be obligated to recall laid-off employees and the recall rights shall be limited to a period of six (6) months. An employee shall at his option accept or reject a recall to his former Employer. A rejection of recall terminates an employee's recall rights.

• • •

5. The facts were agreed to by the parties. Heaton and Hickson both began work in the industry, on or about July 17, 1989, with the respondent employer, Otis Elevator Company Limited. They worked steadily for Otis and on or about July 16, 1991, each became a Helper II, according to the provisions of Article 10.05 of the collective agreement: "Upon completion of twenty-four (24) months in the industry the Helper I shall be reclassified as a Helper II. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training ..." After becoming Helper II's, Heaton and Hickson each took the requisite educational courses, and each had successfully passed them by May, 1992. As Helper II's, each received seventy-five per cent of the Mechanic's rate. Article 10.05 also required that each was to "remain in this classification for a further twelve (12) months in the industry".

6. Although layoffs have not historically been necessary in this industry, because of a down turn in the economy, around January 6, 1992, Hickson was laid off. Around January 20, 1992 Heaton was laid off. On April 7 or 8, 1992, Heaton was recalled to work at Otis, and Hickson was recalled on June 29, 1992. During their respective periods of layoff, neither grievor obtained work elsewhere for other elevator companies covered by the collective agreement. Both did continue with their educational courses, and, as noted, they successfully completed them by May 1992. During their layoffs, both registered on the referral list and were available to be referred to other jobs. Thus, both grievors continued to actively seek work in the industry, and to fulfill the educational requirements described in the collective agreement.

7. The grievances are not over the recall of Heaton and Hickson, but over whether they are entitled to be paid at the eighty per cent rate, reflective of the Improver Helper classification described in Article 10.06 of the collective agreement. By the end of June, 1992, both men were back working for Otis.

8. Since the agreement is industry and province wide, employees can progress through the classifications through working for different employers. In practice, the union is the operator and monitor of the seniority and referral lists, and as such is the only party in a position to be aware of the employees' work histories. Any given employer might only be aware of employment with it, and not the employee's work history with other industry employers. The employers have therefore relied upon the union to advise them when employees have accumulated the necessary months and have progressed to the next pay classification.

9. Here, the union advised Otis that, effective July 16, 1992, both Heaton and Hickson became qualified as Improver Helpers and were to be paid at the Improver Helper rate. The union relied upon Article 10.06 which indicates that "Upon completion of thirty-six (36) months in the

industry, a Helper II shall be reclassified as an Improver Helper", subject to the successful completion of certain courses. Since the grievors had both begun in the industry on or about July 17, 1989, the union advised Otis that "the 36 months in the industry", had passed as of July 16, 1992. Although Heaton and Hickson had both been on layoff for some period from January, 1992 on, in the union's view they still continued to complete the 36 months "in the industry". The union took the position that time "in the industry" began to run from the first day of work for any employer in the industry, and then ran continuously from the anniversary date, including time on layoff.

10. Otis refused to pay the men as Improver Helpers, relying on Article 10.08, which stated that "No Helper may qualify to be raised to the next classification until he has worked the prescribed periods ..." Otis responded to the union that it had not breached the agreement, since Heaton and Hickson had been on layoff, and had not therefore "worked" the prescribed 36 months.

11. The issue for the Board is whether time spent on layoff, while otherwise available for work, is to be counted in assessing whether a Helper II has completed the 36 months "in the industry", within the meaning of article 10.06. The union asserts that layoff periods are to be included in such assessment, and the employer argues the contrary.

12. While it has elements common to both, this agreement is neither like a typical construction industry agreement, with typical hiring hall provisions, nor like a typical industrial agreement, with its seniority and classification provisions. In this agreement, as reflected by Article 10.15, layoff is not generally on the basis of seniority. Except with respect to Mechanics, layoff is by block or classification without regard to seniority. Employers layoff in the lowest classification first, with everyone in a given classification laid off before anyone in the next highest classification. In practice (the Board was advised), within a particular classification the employer is able to choose which employees are to be laid off. The union points to this fact as justifying and requiring the interpretation of "in the industry" upon which it relies. If the periods during which an employee is on layoff are not to be counted towards time "in the industry", then the employer, through its unilateral decisions as to which employees within a classification are to be laid off, can effectively determine the seniority of employees and which employees will have sufficient months of work to progress to the next category. This, asserts the union, would have an inappropriate and an undesirable impact on seniority in the industry and on progression through job classifications. To counter this, the union asserts that an individual's start date in the industry is the significant date for determining one's months "in the industry". Those who start earlier working in the industry, and who are available for work throughout, will first reach the next classification. The union does agree that an individual must maintain some attachment to the industry for the prescribed periods to be met. It asserts that here, where the employees have indicated they are available for other work and have been placed on the out of work referral list, they are sufficiently attached to the industry.

13. It appears to us that Article 10.08, dealing with courses of training and the passage of employees from one classification to the next, applies to Helpers generally. The Article talks about "Helper", and not just specific Helper classifications. It indicates, for example, that "A Helper who fails the test twice at the same level will be reduced to and paid as a Helper I". Earlier it states that "Failure [of the courses] at any level in the progression will result in loss of advancement in the industry." When read in its entirety, and in context, we conclude that Article 10.08 applies to the subject of the instant grievance, the progression from Helper II to Improver Helper. Article 10.08 states that "No Helper may qualify to be raised to the next classification until he has worked the prescribed periods". Clearly, the mere passage of time is not sufficient. To qualify as months "in the industry", the individual must have worked the prescribed periods. To give Article 10.08 any other interpretation would render redundant the last paragraph of that Article, where it states

that the prescribed periods are to “be aggregate periods and may be worked with more than one Employer”. This clause would be largely meaningless if the number of months “in the industry” continued to accumulate, regardless of whether one was working for an employer in the industry during the months in question. If the months continued to accumulate after the start date of the individual in the industry, even while an individual is on layoff, then there would never be a reason to aggregate any periods of work. There would simply be an unbroken accumulation of months “in the industry”, regardless of work history.

14. Other provisions of the agreement buttress our interpretation. Article 10.03.01, which sets out probationary periods for the lowest category, Probationary Helper I, talks about “periods totalling six months within the aggregate period of not more than nine months. The probationary period may be worked with more than one Employer”. This contemplates that, within a nine month calendar period, the individual in question must have actually worked at least six months. Article 10.03.02, defining Probationary Helper II, reads “Upon completion of six (6) months in the industry, to the satisfaction of the Employer and the Union, a Probationary Helper shall be reclassified... the Employer and the Union shall have the privilege of testing the ability of a Probationary employee during this twelve (12) month period.” What appears contemplated by these provisions is that there will be a probationary period, during which the employer and the union can assess the actual work performance of the probationary employee. Even though Article 10.03.02 refers only to months “in the industry”, using the same phrase used in the opening words of the following clauses, including Article 10.06, it is contemplated that an employee must actually work. Article 10.08 establishes a similar requirement for the Helper classifications following the Probationary classifications.

15. The seniority provisions (the clauses of Article 10.14) are not particularly helpful, as they deal with a different matter, seniority, not the progression through job classifications. To the extent they do assist, they reinforce our conclusion that during the layoffs here, “months in the industry” did not accumulate (see Articles 10.14.02 and 10.14.03).

16. The interpretation we give to Article 10.06, based upon the wording of Article 10, makes labour relations sense. It would be somewhat counterintuitive, from a labour relations perspective, to interpret the agreement to mean that individuals could progress through an entire classification, and be entitled to the next pay level, without having worked a single day in the classification. Indeed, on the union’s theory, they could progress through 3 classifications without having worked a day in any of them.

17. We are not unaware of the potential impact of our decision on the current operation of the hiring hall and on individual employees. Nevertheless, it appears clear from the wording of the agreement that the months on layoff for these grievors do not qualify as months “in the industry”, for purposes of Article 10.06. Whether this interpretation will have an effect on seniority is not before us, nor is the question of which workers must be referred to jobs when employees are requested by an employer.

18. Because of our decision, we need not deal with the employer’s reliance on the *Elevating Devices Act*, and the Regulations thereunder.

19. In the result, the application is dismissed.

0429-91-U United Food and Commercial Workers' International Union, Local 1000A, Complainant v. Sobeys Inc., Respondent

Discharge - Intimidation and Coercion - Unfair Labour Practice - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. M. Sloan and K. Davies.

APPEARANCES: Mary Hart, Cindy Jones, Jackie Lease, Chris Taylor, Lynne Taylor and Kevin Corporon for the complainant; Karin A. McCaskill, David Fearon, Timothy Gingrich, Bruce Wood for the respondent.

DECISION OF VICE-CHAIR K. G. O'NEIL, AND BOARD MEMBER K. DAVIES; September 16, 1992

1. The name of the respondent is amended to read: "Sobeys Inc."
2. This is a complaint under section 91 of the Act that the respondent has breached sections 3, 65 [formerly 64], 67 [formerly 66] and 71 [formerly 70] of the *Labour Relations Act* in firing, demoting and disciplining a number of employees at its Stratford grocery store. The respondent asserts that no part of its motivation in any of the actions complained of was anti-union, and thus the complaint should be dismissed in its entirety.
3. The hearing of this matter consumed nine days of hearing, during which we heard the evidence of 13 people. For the respondent, these were Timothy Gingrich, Personnel Supervisor, Ontario Division, Dean Bratton, Grocery Manager at the Stratford store, Bruce Wood, Store Manager, Gloria Martin, Front End Manager, David Fearon, Director of Human Resources, Barry Hagan, Vice-President, Retail Operations for Ontario, John Lynn, Senior Vice-President, Employee and Corporate Affairs, Sue Comley, Deli Manager, Brian Sippel, Night Crew Manager, and Tim Favacho, Dairy and Frozen Food Manager. For the union, these were grievors Jackie Lease, formerly Assistant Front End Manager, Cindy Jones, formerly part-time deli clerk and Chris Taylor, formerly part-time cashier and office clerk.
4. A summary of the evidence pertinent to our decision follows in roughly chronological order. Where the facts were in dispute we have noted any necessary resolution of those disputes.
5. The respondent Sobeys runs about 125 grocery stores in six provinces; the roots of its 85 year history and its head office are in Nova Scotia. In the past four years, it has started operating in a number of locations in Ontario, including Stratford where it opened a store in early 1990. There are approximately 135 employees at the Stratford store.
6. The respondent prides itself on its good employee relations practices, which include the fact that upper management keeps in close touch with the store floor by regular visits and conversations with employees at all levels. These include communications meetings with employee representatives. There had been three such communications meetings in the Stratford store between its opening in early 1990 and the fall of 1991. Evidence indicated that less than 5 percent of Sobeys' 14,000 employees are unionized. A number of management witnesses made reference to their

belief that the reason for the low rate of unionization is the success of its open communication policy, together with competitive wages and benefits.

7. Management was aware of attempts to inform employees about unionization or sign cards at all of its Ontario stores. Company witnesses said they took no action about it, other than asking managers if there were any outstanding issues that should be resolved. Wood, the Stratford Store Manager had heard rumours of union activity from the first week the store opened and specific names of individuals interested sometime before March 1991. He said that, in the end of February, 1991, he was told by Gloria Martin, the Front End Manager that she had been told that Chris Taylor had attended a union meeting. He learned that the source was Jacquie Lease after he had found an organizing list which is at the centre of this dispute. Wood testified that he had heard that Taylor was at a union meeting from two managers, Martin and Sue MacIntosh, Bulk Food Manager and that after he found the organizing list on March 27 he told Personnel Supervisor Gingrich about this.

8. Although Martin says Lease approached her with the information about Taylor, Lease maintains that, sometime in the end of February or the beginning of March, Martin brought up the subject of unions and asked her if she had heard any union talk. In cross-examination, Lease said she felt there was nothing wrong with Martin's having asked her that. Both agree that Lease told Martin that there was something she felt she should tell her. Martin says that the information that followed was that Chris Taylor was going to a union meeting, and that what she told Wood was that Taylor had been asked to go to a union meeting. By contrast, Lease says she told Martin that Karen Ritchie, a meat wrapper, had asked Chris Taylor to attend a meeting and she had declined. On cross-examination Lease said that she thought she should tell Martin this because of her position in the company - that it was her duty as Assistant Front End Manager. At that point in time Lease was not herself involved in union activity. Later she said that it was because Taylor had not gone that she told Martin, and she did not feel any obligation to tell Martin about her own or other union involvement later. To make sure it was repeated correctly, Lease says she told Martin that if she was going to Bruce with this she wanted to be there. By contrast, Martin says Lease specifically asked her to go to Bruce Wood with the information. Taylor testified she had been invited by Karen Ritchie sometime in February to go to a union meeting, but that she did not go because she was never advised of the place and time. In the end, little turns on the different versions of this encounter and we find it unnecessary to resolve the inconsistencies.

9. On March 4, shortly after Wood heard about Taylor in association with a union meeting, he had a meeting with her and Martin about another employee, Linton. In the course of discussing this matter, Martin told Taylor she was very pleased with her performance, that she just needed to have more confidence. After they had discussed Linton, Wood, "out of the blue" (his words) asked Taylor if she had attended a union meeting. Taylor says he said he introduced this question by saying he wanted to ask her about something that really perturbed him. When she denied it, Martin and Wood say she became very defensive. Wood then said, "That's fine. That's all I wanted to hear." Taylor says that Wood did not appear to believe her and repeated the question twice. Martin says he only asked once. Wood maintains that the context of this exchange was a good relationship with Taylor in which discussions of many topics were common. She had spent a significant amount of time working with Wood as payroll clerk. He said he was very hurt and disappointed that if she had a problem she would not have felt comfortable coming to him. He sees one of his primary responsibilities as store manager to be keeping lines of communication with the staff open. It is his personal view that if employees want to be represented by a union, lines of communication are not being kept open. He felt he had failed because she had not come to him.

10. Taylor says Martin told her to come to this meeting, while Martin and Wood say Taylor

initiated it. Taylor did offer to be accommodating about the timing of the meeting and volunteered to come in on her day off in order to avoid having to go through the matter twice - once with Wood and once with Martin. Again, little turns on the discrepancy.

11. Taylor was so concerned about the fact that Wood did not appear to believe her that she went to talk to him again that night, although he does not recall the conversation. She told him it was really bothering her that he did not seem to believe her, but that she had been called about a meeting and did not go. He asked her if she could tell him if she had been called by a Sobeys' employee, that she did not have to give him a name. He said his informant was an A & P's employee. Taylor said, "Obviously one of us is lying," and that it was not her. Wood then said, "If that's what you say, I believe you; I'll tell Tim Gingrich." She did not understand why he would be telling Gingrich this.

12. Sometime in the middle of March, Lease and Bratton, the Grocery Manager, had lunch together, as they often did. During the course of the lunch Bratton asked Lease to help him find out who had gone to a union meeting, by asking her friend, a steward for the union at another company, who had been there. He suggested she could pretend she was interested in order to get him to give her the information. At the time Lease was not active on behalf of the union. Lease said she did not answer Bratton right away but later told him she could not do that because she could not betray a friendship like that. Bratton does not recall her saying that. Lease's cross-examination on this indicated that the reason she did not want to do this was that her friend would not want the information going back to Sobeys and that Bratton would feel he had to report this to Wood just as she had felt she should report to Martin on the union meeting. She assumed Bratton was trying to solve problems, and did not think it odd that he was interested in the meeting. Bratton said he was not sure what he would have done with the information and no one had asked him to do this. The conversation with Lease took place sometime after a conversation with Woods about rumours of union activity.

13. The central events in dispute before the Board start with Wood's discovery on March 27, 1991, of an organizing document intended for the use of the complainant union. It contained employee names and phone numbers which the respondent maintains are confidential company information, improperly taken from its front end office by the grievor Jackie Lease. The front end office is the most secure part of the Stratford store and is where cash and records of several kinds are regularly kept. Both Lease and Taylor had access to and keys for the front office because of their duties with cash. Lease was Assistant Front End Manager, and Taylor was a part-time cashier with certain duties in the office. Most employees did not have such access. As will be seen in more detail below, as a result of their respective roles in compiling the list, Lease was fired and Taylor lost access to the front office.

14. What Lease had done was copy the initials of the employee's name and the last five digits of their phone number from a list which is used to call cashiers and packers in to work. As well, she had obtained additional numbers from an address book kept by the Front-end Manager in a locked drawer, to which Lease also had routine access as Assistant Front-end Manager. Chris Taylor put the last three names and the department numbers on it and did the rating of probable level of interest in a union. Taylor testified that she did not know where Lease had gotten the other names or phone numbers; she and Lease did not discuss this point. The names other than the front end names came from memory. Lease had intended to leave the list in the mail slot of Sue MacIntosh, the deli manager, who was apparently going to add names to the list. She later decided it was a better idea to leave it in her car and arrange for MacIntosh to pick it up.

15. As Store Manager, Wood regularly sees all the mail before it is distributed. He found

the list in a manila envelope in the mail slot of the front end office with "Jackie Lease" printed in large letters on it. he opened it because he thought it was information that she had requested from the credit bureau about applicants for Sobeys' cards. She was going on holidays that day, and he had not seen this envelope before.

16. Wood was surprised to see that Lease was involved in organizing for a union because he considered her position as Assistant Front End Manager to be inconsistent with that. He felt betrayed and disappointed about this potential breach of trust, since he had been instrumental in promoting her. He said what he meant by breach of trust was the fact that there was a good possibility Lease had breached the policy on confidentiality by releasing information to a third party. He discussed the matter with Gingrich; they both shared the view that if she had breached the confidentiality policy by taking information with the intent to give it to a third party, in this case a union, there was no choice but to terminate her.

17. Wood said that all copies of the list were in the hands of head office officials within a short time after its discovery on March 27. Taylor testified she is sure the original of the list was in Sue MacIntosh's hands on April 5, because she saw it in MacIntosh's hand and flipped through it, when MacIntosh asked her for more phone numbers. MacIntosh did not testify, and the evidence provides no explanation for how this could be, if both witnesses are correct. In the end, nothing turns on it.

18. It is conceded by the respondent that most of the information on the list could have been obtained from the phone book. However, there are certain exceptions to that, such as a number which was listed under a different last name in the phone book and an unlisted number. More importantly, however, in the respondent's view is the fact that it ensures employees that information that they give the company will be kept confidential. Fearon, Director of Human Resources, said this aspect of the policy is very important to the company as a basis for the trust necessary to the open communications with management it tries to foster. However, the information can be made available to employees in the store for reasons such as switching shifts. Outside parties like the United Way have been denied access to employee names and phone numbers. Vice-President Hagan testified that the idea that all information was confidential as to third parties is universal in the grocery business.

19. The respondent's position is that Lease knew that the names and phone numbers were confidential information, and that it was contrary to company policy to take it and use it in the way that she did. Lease says she did not know it was against policy, that she used the list because it was quicker than the phone book. The company policy book has this to say on the subject of confidentiality:

**CONFIDENTIALITY OF
COMPANY INFORMATION**

Due to the competitive nature of our business, employees must not use any internal information about the affairs of the Company, its employees and/or benefits, or its clients and suppliers for personal gain or to benefit third parties, competitors or any other individuals.

Employees must respect the confidentiality of information regarding the Company's operations, its employees, clients, and/or affiliated retailers. Confidential information must not be revealed to any unauthorized people.

In turn, the Company recognizes employees' rights to privacy, and will not release confidential information about employees without authorization.

All operational and financial information, statements, reports and administrative memos relat-

ing to any details concerning Sobeys Incorporated activities, must be used with discretion and remain strictly for internal use.

Each employee was required to sign a statement that he or she had read the policy, which Lease and Taylor did. Lease said that although she had signed it, she had never actually read it. However, she agreed that in her termination interview she probably left Hagan with the impression she had read it. Before the publication of the policy manual in early 1991, there was no written policy, but the part about the confidentiality of employee information was stressed with managers by way of memo.

20. The union referred to several instances of practices which it says show that the confidentiality policy is not as thorough as the respondent asserts. These included the posting of schedules with employee names near public washrooms, or within sight of customers over a counter, and the partial visibility of the above list of employee names and addresses through the Plexiglas wall of the front-end office. As well, service personnel and other employees could easily see the list in its usual place on the desk in the front office. As well, it is possible to climb over a safe into the front end office, if one expends the effort.

21. More specifically, Jones testified that she had been able to call the store and obtain an unlisted phone number of an employee from someone in the Sobeys' office without identifying herself. On another occasion, her husband was able to get the last name and address of an employee. However, since the addresses are not kept in the department, it appears that the person who gave this information had not gotten it from information kept in the deli department. She also said that she had been told by her supervisor not to give out sales information and an employee had once asked the deli employees not to give out her phone number to her husband.

22. In cross-examination of company witnesses, union counsel made a distinction between material that is competitively sensitive, such as advance pricing information and the information involved in this case - a list of names and phone numbers. The company does not accept that the policy was only intended for the former type of information. Hagan, for example, cited the problem raised by spouses looking for alimony and bill collectors looking for debtors as reason for the policy to cover both categories of information. He made a distinction between the names as opposed to addresses and phone numbers, because just names does not make contact possible, such as in the alimony or collection situation. Hagan said that if people call looking for employee phone numbers, that the practice is to take the caller's phone number and let the employee decide whether to call back or not.

23. Senior Vice-President Lynn said that union organizing was a fact of life, but that the company did not accept that supposedly secure information would be transferred to facilitate that. He considered the list to be something that was communicated for the union's gain. The manner in which the information was obtained was important. If it had been obtained some other way, Lease would not have been fired. Lynn gave the example of a manager of Sobeys' convenience store division who was fired when he admitted he was intending to release plans about a new concept of convenience store to a third party, despite the fact the employee had not yet released the information. He was not aware of anyone who had released confidential information and not been fired. There was no evidence of any previous incident in regards to the release of names and phone numbers.

24. About a week after the list was found, Barb Leslie, who had previously been a Sobeys' employee for about a month, heard that there was a possible opening on the midnight shift. She called Martin, who was pleased at Leslie's offer to work four midnight shifts because the midnight shift is often hard to cover. Wood and Martin's evidence is consistent that Martin had offered Leslie the opportunity to be rehired subject to checking with Wood. (Leslie did not testify.) This had

gone as far as telling her when to pick up her uniforms, and setting her first shift as Monday April 8. However, Wood countermanded the rehiring on April 5. He was concerned that they not hire someone and then have to cut back hours, since the immediate availability of hours was because of a temporary absence. As well, he had a grocery clerk who wanted more hours who was also trained on cash, and could be used on midnights, a fact of which Martin was unaware. Wood did not want to send the message to other employees that it was necessary to quit to get more hours. Further, Leslie wanted a guarantee of 32 hours a week, which he thought would unduly restrict flexibility in scheduling.

25. Martin felt badly about the impression she had left with Leslie and did not get back to her until April 8 when Taylor jogged her memory by offering to take the uniforms to Leslie. Later Martin told Wood that she had contacted Leslie, who understood, and that Martin would phone her if anything came up. The union alleges that the reason that Leslie was not rehired was that she was friends with Lease and Taylor and thus identified as a probable union supporter. Wood and Martin denied any knowledge of any particular relationship between Leslie, Lease or Taylor, or any involvement of Leslie in the organizing activity. There was no evidence that Leslie was involved in any union activity.

26. On April 4, 1991, Fearon, Hagan and Gingrich had decided that Lease would be terminated if she had taken the information on the list from the store office. Hagan, as other company witnesses, maintains that the fact that the third party was a union made the decision more difficult, but that it felt that the company could not change its practice and policy because of that. It felt it had to apply it as had always been applied. Fearon had communicated this decision to Vice-President Lynn, who agreed, and Hagan informed President J. R. Sobey of it.

27. Lease started working for Sobeys as a part-time cashier on January 2, 1990, before the store opened. She was soon given responsibilities such as training other cashiers and was asked to work in the office. She learned most of the office procedures, which included the handing of cash, floats, balancing, and some scheduling. In mid-September, she was offered the position of Assistant Front-End Manager. It is clear that she had been considered an above-average employee. Hagan had not reviewed Lease's personnel records before he reached the conclusion on April 4 that she should be fired if it was true that she had taken confidential information. However, he was aware that she had been promoted to Assistant Front End Manager from cashier, and thought what she had done was a breach of the trust implicit in her position.

28. Vice-President Hagan and Personnel Supervisor Gingrich met with Lease on April 8. Although it is unusual to have a vice-president involved with discharges at this level, Fearon was on vacation. Since Lease acknowledged that the store office was the source of the information, she was terminated at the meeting. Lease agrees that she did not tell Gingrich or Hagan that she did not know what she had done was wrong or against company policy. Hagan maintains that she specifically said she knew what she did was wrong and that it was a way of getting even with Wood, with whom she was angry. Lease acknowledges the latter point, but says she never said she knew it was wrong, although she probably said, "Sorry" at the end of the meeting.

29. A meeting with Chris Taylor followed closely on the termination meeting with Lease. Hagan asked Taylor what her involvement had been with the organizing documents which he showed her. Taylor says she mentioned that Wood had already accused her of going to a union meeting and that Hagan said that was no concern of the company's; that she could do what she wanted on her spare time. Hagan describes this exchange as Taylor becoming incensed and asking if he was questioning her right to be involved in a union, to which he responded, "Absolutely not". She said she had helped Lease write the list and categorize people. Hagan asked if there was any-

thing else. She said no. Hagan says he then said, "Fine, then I don't think we have anything else to discuss", and the meeting ended. Taylor says she left the meeting afraid for her job, although she did not think she would be fired. She said it never crossed her mind that she would lose her job for going to a meeting or making a list.

30. Since Taylor's involvement was only in ranking the employees as to their likelihood to support a union, she was not fired. Rather, she was excluded from further access to the front office. Taylor had worked an average of one or two shifts a week in the office. When she did so, she supervised cashiers and balanced cash. On occasions where she worked there without an Assistant or Front-end Manager, this work attracted a premium, which she had not been paid very frequently, since she often worked with one of them. Gingrich said that he and Wood decided on the exclusion. Hagan testified that Gingrich suggested it and that he concurred. This was because management did not trust her anymore, although she was not informed that was the reason. Hagan said she was aware that a policy violation had occurred and had not reported it, which left doubt as to her credibility in his mind. When Taylor was informed of this exclusion, she left the store after lunch and later confirmed she had quit.

31. There was a dispute as to credibility on the question of whether Gingrich took notes in the meetings with Taylor and Lease, and their accuracy. He says he took notes during the meetings and made some immediately after the meeting with Lease. Hagan did not see the original of the notes but scanned the typed copy and agreed it accurately reflected what went on at the meeting. He also agreed that Gingrich took notes at the meeting as he was sitting there with pen and paper, although he said his attention was elsewhere through much of the meeting. Lease and Taylor said they never saw him take notes. Each of them disputes the accuracy of his account in some respect. The most important part of this dispute over the accuracy of the notes is that Gingrich's notes indicate that Lease acknowledged in a number of different ways that she knew what she had done was wrong, and that she should not have done it. More will be said about this below, but it is to be noted that the dispute is one of degree, since Lease acknowledges that, during the interview, she did not deny that taking the information from the front office was against policy, nor say that she did not know it was wrong. Gingrich acknowledged that she said "it's just a list of names", at some point in the interview.

32. After the meetings with Lease and Taylor on April 8, Gingrich held a meeting with the department managers together with Bruce Wood for the purpose of clarifying Lease's termination and to reassure everyone that she had been terminated for taking confidential information, and that the fact that it had been taken for union purposes was not any concern of the company's. They were concerned that although she had admitted a breach of confidentiality, it would be perceived by employees that she was fired for trying to recruit a union. Gingrich told the managers that employees had a right to join a union.

33. After meeting with the managers on April 8, Gingrich set up meetings with the employees, by department, for April 11 to make sure all employees knew that the firing had nothing to do with the union and to reiterate the company's position about competition. Employees were expected to attend and paid for their time. Gingrich took a list of points to be made into these departmental meetings. He took the opportunity to outline how the employees' terms and conditions of employment favourably compared with the competition's, but stressed that employees had the right to join a union if they so wished. In answer to a question, he told the employees that the Sobeys' stores which were unionized had been so when Sobeys acquired them. He acknowledged on cross-examination that the competition to which he was comparing the employees' terms and conditions of employment included their major unionized competitors. He made the point that job

security depended on a successful company and reminded them that people at Dominions and Zehrs had lost their jobs. Dominions and Zehrs are unionized.

In answer to a question as to what the company's concern with the ranking on the documents was, Gingrich told employees that it was no concern of the company's, they were free to join a union, and they might be contacted at home by the union. He said some employees did not appreciate their phone numbers having been obtained from company records. Gingrich testified that he did not know if the information had gone to the union.

34. Jones testified that in her departmental meeting, someone asked Gingrich why anyone would want a union. He replied that he did not know himself why, that unions really did not help. He said that at Sobeys they made sure employees got fair rates of pay compared to the other unionized stores. Jones says that Gingrich said with a union, you are not guaranteed to keep a job, and gave Dominions as an example. Gingrich says he said that only a profitable company can give job security and gave Dominion as an example. Jones says he also said that part-timers could not work more than 24 hours and that they got little or no benefits whereas Sobeys had profit sharing and a drug plan for part-time workers. Jones also testified that he said you have to pay dues if you are unionized, but at Sobeys you get job security and benefits without dues. She acknowledges he also said no one can tell you what to do - if you want to join a union, you can.

35. Because of scheduling problems, the meeting with the grocery department was not done by Gingrich, but by Bratton. Bratton initially testified that he had not said anything in this meeting about the effect of unionization on part-time staff and had not gone beyond the subject of why Lease was terminated. He was later recalled to correct that evidence. On the first occasion he gave evidence he also denied asking Lease to get information for him about employee interest in unionization by pretending she was interested in the union. He later changed that evidence as well. He attributed his incorrect evidence on the first occasion to being nervous and surprised he was being asked those questions. He said his memory was jogged and it all came back to him a few days later. When he was recalled, Bratton said he had been asked the question, "What are unions about?" after he had said Jackie Lease was not fired for organizing a union. He responded by saying that most unionized stores have a 24-hour limit for part-time, unlike Sobeys where part-timers can work 32 hours. The Produce Manager immediately corrected him, saying this differed from place to place. He also said Sobeys' wages kept up with unionized stores and discussed Sobeys' benefits, including a profit-sharing plan, which he believed was unique among grocery companies. He also said at the meeting that he had belonged to a union in Saskatchewan and they had done nothing for him except take his dues. He felt he was expressing his own, rather than the company's views. At the time he was acting Store Manager because Woods was away on vacation.

36. Lease maintains that she returned to the store about a week after her firing to clean out her locker. Her version is to the effect that she came across Tim Favacho, acting store manager. She asked him to come upstairs to the break room while she cleaned out her locker. He said sure, but to wait a minute. Before they went upstairs, another employee asked her if she was coming up for coffee. Lease says she went up and Favacho came later, and the three of them had coffee. She said she was there about 15 to 20 minutes. She is sure Favacho was there when she cleaned out her locker and that he escorted her out after this visit. By contrast, Favacho testified that Lease came to the store on April 23 and that he did not see her until he was in the break room. He maintains he neither had coffee with her, nor saw her clean out her locker. On cross-examination, he acknowledged talking to her across the tables in the lunch room.

37. Shortly after this event Lease heard from a friend that she had been banned from the store. Wood said this was on his instruction after she had been found trespassing, apparently refer-

ring to her presence in the employee coffee room on the above occasion. We have no information as to what Wood had been told transpired when Lease was in the store. In the beginning of October she was in the store with Taylor when Favacho asked them to leave. Wood said there was no ban on Taylor; in his view she had terminated her employment of her own accord.

38. On April 25, anticipating an increase in business because a competitor's store was closing, Wood called Leslie, who as mentioned above, had earlier not been hired back, and offered her work, but not on the midnight shift. Wood said that they had still not hired anyone on midnights, using their own staff to fill in instead. At about the end of the month, signs went up advertising for cashiers, but not for midnights. To cover Lease's and Taylor's hours, they increased the hours of existing staff who had previously had their hours cut back.

39. In early May, the company held meetings at a local hotel at which John Lynn, Vice-President of employee and Personnel Relations, gave a seminar on the company's position on the economy, which had first been presented elsewhere early in April. The union alleges that there was an anti-union message being delivered at the same time and that it was brought to Stratford because of the union activity. This presentation was given in the Barrie and Stratford stores and at a wholesale location in Ontario, as well as several locations in other provinces, both unionized and non. Employees were expected to attend, and paid for their time, although not every employee attended. The text of this speech was entered into evidence, the majority of which was reproduced on overhead slides as Lynn spoke. The management witnesses who attended saw the presentation as a means to reassure the employees that Sobeys was not going to be a victim of the recession, that their jobs were secure and the company was a good one. Jones testified that Lynn said that the reason Sobeys had profit sharing is that they did not have other people telling them how to spend their money, and that sometimes it was not just companies who were told what to do with their money, but employees also. She was sure he was talking about union dues.

40. The management witnesses could not recall the word "union" being mentioned. The word union appears in the written text of the presentation, which Lynn says he read to the employees, in a part which deals with the company's goal to remain competitive. This section reads as follows:

DEFINITION OF "COMPETITIVE"

The statement we will remain "competitive" must be understood in the following context:

- Our wages and benefits as an overall package will be compared with our competitors on an annual basis.
- We obviously will not have identical terms and conditions of employment as other companies in the food distribution business for the simple reasons we are different, we have different priorities and different work groups and not all of our businesses operate under identical conditions or environments.
- In some areas, we will be superior to our competitors and in others slightly deficient, but on an overall basis our commitment is to be competitive. Obviously, if we were the leaders in all areas of our terms and conditions of employment, we could not despite all of our combined efforts meet the challenge of being the lowest cost distributor. The one area in which we will never lead the pack is in wages, however we will be competitive.
- In addition, we will never allow a competitor or organization to dictate our terms and conditions of employment in any component of our organization. This would be irresponsible and would place us on the road to becoming non-competitive and a high cost distributor in an industry which must keep costs down and efficiency up with bet-

ter service to the customer. We really do not want to talk about the future in this type of environment because if we do we inevitably must look at Companies such as:

- | | |
|-----------------------------|-------------------------|
| — Atlantic Wholesalers | — Perfection Foods |
| — Dominion Stores Ltd. | — Steinberg Stores Ltd. |
| — Baird & Company Ltd. | — Royal Grocery |
| — Miracle Food Mart | — Canada Packers Ltd. |
| — DeBlois Food Distributors | — National Grocers |
| — National Sea Products | — Great A & P Company |

All of these Companies were either sold, broken up, closed, bankrupt or rationalized. These Companies became inefficient high-cost distributors where shareholders, employees and unions expected to extract too much from the business, there was too little capital investment and above all they lost sight of why they existed (i.e. to give customers what they want at the price they want it).

At Sobeys Inc., we want to assure a bright and secure future for our owners, shareholders and employees. This is the responsibility of management and employees.

Lynn felt Dominion was a good example of the problems cited, and the only comment he recalled making aside from the text was that Dominion had become uncompetitive for all the reasons set out in the text. Sobeys decided to compete with Dominion rather than buy it because of those reasons. He said he was not aware that the Stratford Dominion store had recently been sold and jobs lost. He denies that the above material constitutes negative comments about unionization as the union alleges.

41. Gingrich also held an orientation meeting at the Grimsby store and an August communication meeting at the Woodstock store, where the subject of Lease's termination was raised. The union alleges an anti-union message was delivered. Gingrich says nothing was said about unions at those meetings, although the company's philosophy and practice about communication with employees was discussed. At the Woodstock meeting, Gingrich spoke of the reason for Lease's termination and held up the document which had been the basis for Lease's firing.

42. The union alleges Cindy Jones was disciplined unfairly because of her association with active union organizers. She received a written warning for excessively long breaks and not punching in on time and a verbal reprimand for wearing jeans contrary to the dress code. Gingrich was satisfied from the reports he had that the allegations were true, and reviewed the reprimand before it was presented. Although Jones said she was never spoken to about breaks before the warning, she remembered that Comley, the deli manager, had spoken to the deli employees in general. Comley said she had spoken to Jones on April 5 about breaks. Jones agreed that she knew she should have been punching in and out for breaks and that she knew why she had been written up.

43. There is no evidence Jones had anything to do with the union, or that management thought he had. Her evidence was that she wanted to keep her opinions from management and that she did not answer yes or no when asked her views. There is no allegation that she was asked her views by management. She was ranked as "questionable" on the organizing list. Jones thought she was being picked on because of her association with Karen Ritchie, who apparently was active on behalf of the union, who was her friend, and friends with Lease and Taylor. There is no allegation that any action was taken against Ritchie.

44. The union alleges that it is company practice to ask employee views on unions prior to hiring. Gingrich stressed that in the highly unionized grocery industry in Ontario, the majority of their employees come from a union background. Each management witness who was asked denied that the issue of support for unions was raised by them in interviews or formed any part of their

hiring decisions. The subject may come up if the prospective employee raises it. Gingrich said there are no guidelines to lower management about what questions to ask in interviews. He sometimes asks what an employee thinks of the employer/ employee relationship at a previous place of employment and how they enjoyed previous jobs. Martin said employees sometimes ask if Sobeys is unionized and she answers, "No, does it make any difference?"

45. Lease maintains that Gingrich asked her opinion on unions when she was hired, and that she responded that if you do your job well, you really don't require one. She had been warned by a friend that a question like that might be asked and that the store was basically non-union. On cross-examination, she said that she had not gotten the idea that the company was against unions. Taylor testified that Martin asked her how she felt about unions without her having raised it herself and told her it was a family-based, non-union store. Taylor responded that she preferred a non-union store because she needed the job and knew Sobeys was non-union.

The Parties' Submissions

46. The company asks that the complaints be dismissed as no anti-union animus was present in the impugned decisions. Respondent's counsel stressed the largely unionized nature of the Ontario retail food industry and the fact that most of the witnesses on both sides had worked in unionized environments. Counsel asked us to draw the inference from the fact that most of the company's 14,000 employees are not unionized that it was their choice, that the company could not remain non-union by being anti-union. Rather, it has tried to be a model employer, trying to keep on top of problems, but not reacting to news of union activity.

47. On the question of confidential information, counsel stressed that the union had no legal right to the names and phone numbers, and that the company was enforcing its policy and its undertaking to its employees to keep their private information confidential.

48. Dealing with the allegations concerning the individual grievors, counsel started with Lease, and underlined that the company knew there might be scrutiny of their decision because the breach of company policy was related to union organizing. However, she maintains that there is no suggestion in the law that an employer cannot do what it normally would once a union is on the scene or that an employee immunizes herself from appropriate discipline by engaging in union activity. Counsel asks us to find that the usual response to serious breaches of company policy, rare though they are, is dismissal. The idea that it was a concern for the use of confidential information and not union organizing which motivated the discharge is supported by the differential treatment of Taylor and Lease, and the fact that there are no allegations of any action against the individuals rated high in terms of union support on the list found. Hagan was left with the clear impression Lease knew she had done something wrong. In the interview with Taylor, Hagan made it clear that it was none of the company's business if she was involved in union organizing.

49. Counsel underlines that management then went to some lengths to reassure other employees that the discharge was not for union activity and to make clear to department heads that employees have a right to organise.

50. Counsel asked us to find that Lease had not been forthright with the Board as evidenced by her evidence about clearing out her locker which should not be preferred to the straightforward evidence of Favacho to the contrary.

51. Counsel stresses that both Wood and Bratton thought employees seeking unionization had some sort of work-related problem that needed to be addressed by management, they wanted to solve problems, not learn who union supporters were for anti-union reasons.

52. As to the allegation that Taylor was intimidated, counsel points to the evidence of her approach to Wood as not the action of someone who was intimidated. She quit because she felt management did not trust her; management had cause for its concern about her trustworthiness after she was involved in a process which was sending confidential information to a third party.

53. The evidence does not, in counsel's submissions, connect Barb Leslie to the union in Martin's or Wood's mind. Wood vetoed Martin's desire to rehire Leslie for business reasons and not for anti-union reasons.

54. Counsel submits that Jones is not tied into union activity either. There is simply no basis in the evidence for the inference that union activity was the basis for Jones' discipline.

55. On the question of Lynn's presentation, counsel submits there was nothing illegal or even dealing with unionization in the speech. Counsel submits that evidence about the store meetings with employees also fails to meet the onus on the union to establish a breach of the Act. Although Bratton said people might have their hours cut back if the union came in, the Produce Manager corrected him; there was nothing to pressure or threaten anyone. Equally, in counsel's submission, the evidence does not support the union's allegations about hiring practices. Although the subject of unions may come up there is no evidence that the company tries to find and exclude potential union supporters. Counsel referred to *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 and *J. Pascal Inc.*, [1985] OLRB Rep. July 1075 as well as the Ontario government's discussion paper on labour law reform, specifically its indication that unions do not currently have a legal right to employee information for organizing, in support of her contention that the company's actions do not support a finding of illegality.

56. By contrast, union counsel argues that it was the destination of the information that caused the discharge of Lease, and that we should infer that anti-union animus was present, despite the denials of the managers who testified. The intense involvement of senior management from the moment the list was discovered is cited as evidence of this. As well, the union points to the evidence of less than consistent enforcement of the policy, such as the fact that a non-employee was able to obtain an employee's phone number over the phone without identifying who he was. Further, counsel argues the real focus of the policy is the competitive nature of the food industry and the necessity to keep secret information as to sales and corporate plans. She suggests that its use in this instance was at least tainted with anti-union animus. While acknowledging that the line between proper and improper discipline in this situation may be fine, counsel argues that the company did not isolate the events from the context of the union organizing campaign. If they had, it is suggested an employee with as good a record as Lease would not have been fired for making a list of employees' names and phone numbers.

57. As to Lease's alleged acknowledgement of wrongdoing, she says that Lease's evidence rings more true. She is said by Gingrich to have been worrying about doing something wrong while on vacation, while she says she said it's only a list of names.

58. Counsel did not disagree with the general proposition that employers should keep information confidential. However, she said the key question was whether the panel was persuaded that Sobeys' desire to keep union free played no part in the decision to fire Lease and demote Taylor. The union submits that the proper conclusion is that they were disciplined for collecting information for union activity. Counsel argues that there is little doubt that the result would not have been the same if the list had been used to gather employees for a social event. Union counsel referred to *Fabricland Distributors Inc.*, [1991] OLRB Rep. July 836 and *Knob Hill Farms Ltd.*, [1987] OLRB Rep. December 1531 in support of her arguments.

59. As to the company's suggestion that Taylor had not lost anything substantial by being excluded from the office, union counsel submits that it was a "plum" that was taken away from her for which she had worked quite hard. Further, counsel submits that the basis for the new lack of trust in Taylor was never sufficiently explained if they believed that all she had done was rank people as to interest in the union.

60. On this aspect, counsel cites Bratton's attempt to get Lease to lie so he could get information about the union as particularly telling. He then discussed the matter with his superior, Wood. Wood then responds to Taylor that all he wanted to hear was that she had not been at the union meeting and says he'll tell Gingrich. Why he was going to tell Gingrich has not been explained. As to the suggestion that managers were just problem solving when they asked employees about various union activities, counsel suggests this would be more credible if they had actually asked about problems. Rather, they asked about attendance at meetings and the actual union activity, not about dissatisfaction at work. Various managers were hurt or betrayed on hearing that employees they valued were considering unionization. This is not evidence which supports the company's case, in counsel's submission.

61. Union counsel asks us to prefer the evidence of the union witnesses because the management witnesses in her estimation were evasive on cross-examination, with the exception of Gloria Martin. The union submits that by contrast its own witnesses were completely straightforward. She cites Gingrich's reluctance to say he had used the organizing document in meetings with employees at other stores, or that the meetings with all the employees at Stratford were unique, although when pushed, he finally did.

62. On the question of the content of the employee meetings, counsel submits that the juxtaposition of the messages about discharge for confidential information which was going to a union and the competitive situation of the company in a context of local business failures was no accident. When Bratton gave evidence the second time, he gave evidence as to matters which are consistent with Gingrich's message.

63. Counsel argues that Sippel's evidence about Jones' discipline simply makes no sense. He said he was repeatedly warning everyone although he only had a problem with two employees. Furthermore he said there was no problem on Sunday, while Woods said the problem was on Sunday.

64. In reply, company counsel argues that the union is trying to belittle a very important policy that the employer takes seriously. Further, there is no negative inference that the Board should draw from the corporate involvement in the store or the decision making. This is part of Sobeys' management style: they stay on top of things.

65. As to the inferences union counsel asked the Board to draw about the motivation of the managers who questioned employees, she suggests that Lease's response is the most telling. She assumed Bratton was asking because he thought there might be problems; further Lease and Bratton are friends of longstanding. She describes Lynn's presentation as a road show to union and non-union places alike. She suggested that Jones' perceptions should not guide the Board, as she generally appeared to feel picked on. Whether Taylor only ranked or not, that is apparently what the managers had been told at the time of their decision to fire one and not the other. Counsel argues that if the list had been used for a social event, the circumstances would have been very different. Here, the employees were clearly intending that the information go to a third party. We know she got at least one unlisted phone number from using the list rather than going to the phone book. In closing, counsel maintains that there is no evidence of fear or intimidation on the part of anyone.

Decision

66. We will deal with the allegations by reference to the events set out above in approximate chronological order. The events and conversations set out above which took place prior to April 8 are not pleaded as constituting violations of the Act. Rather, they were part of the surrounding circumstances about which both parties led evidence without objection from the other. They will be dealt with together with the issues specifically pleaded, as necessary.

67. On April 8, 1991, three things happened of which the union complains. They are: the discharge of Lease, the denial of further access to the front office to Taylor without explanation, and the refusal to rehire Leslie. We will deal with each of these in turn.

Lease's Discharge

68. The question to be decided is whether the decision to fire Lease was in any part motivated by anti-union sentiment, or was, as the company maintains, an even-handed application of its policy against the release of confidential information to third parties. There can be little doubt that the taking of the information to release to out-siders without the employee's authorization, to the extent that it can be considered confidential, was a breach of the company's policy set out above. It is sensible that the confidentiality policy would cover both information which is commercially sensitive, like pricing information and information on employees as individuals. The company's evidence that it seeks to protect employees from release of information which would allow contact by debt collectors, alimony seekers and charities was credible.

69. The only major question, and a difficult one, is whether the severity of the company's response was tainted by anti-union sentiment. In this respect, it is necessary to address the nature of the company's position on unions which was dealt with in evidence in a general way by both sides as background to this dispute. It is clear that Sobeys is proud of the fact that it has a very low level of unionization in its operations. It sees this as a positive by-product of its policies on communication and its terms and conditions of employment. That Sobeys would prefer to operate without unions is clear from the evidence; this fact is unsurprising and not illegal.

70. There is another aspect to the company's view of unions as well. To the Sobeys' managers we heard from on the subject, employee interest in unions is symptomatic of problems in the organization. The lower level managers saw the presence of interest in unions as failure on their part. This was particularly clear about Wood, the Store Manager, but applicable to others, including Bratton, as well. Other interpretations, such as that employees might be interested in unionization as a way to participate in the workplace or society does not appear to have been something the managers considered. This may also be unsurprising, and without more, is also not illegal.

71. However, the line between legal actions that have a by-product of a low level of interest in unionization, including neutral interest in problem solving, as opposed to activities which are partly motivated by a desire to discourage unionization or interfere with organizing activity can be quite fine. And the ability to understand and maintain the difference in practice will vary from individual to individual. The company is made up of a variety of individuals, each with his or her own understanding of these issues. The issue here is one of motivation; it is necessary to determine from evidence and reasonable inferences therefrom what is most probable in all the circumstances.

72. The managers involved in the decision to fire Lease considered their vulnerability to scrutiny because of the involvement of the union and nonetheless decided that their only avenue to deal with the offense was termination. They rely on their general practice to deal with serious breaches of company policy by termination. In dealing with the question of what amounts to a seri-

ous breach of policy, comparison was made to the one specific case of the convenience store manager who was fired for releasing material about the company's manner of operating the store.

73. It is not the transfer of the information itself to the union of which the company complains. It was specifically the company's position that had Lease gotten the material together from the phone book, there would be no complaint. With the exception of an unlisted phone number, all the information on the intercepted list could easily have been obtained in that manner; it is not disputed that Lease only used the office lists because it was quicker. Thus, the vast majority of the information itself cannot be considered truly confidential, in the sense that Lease would have had no right to it except for her access to the office. However, in the company's view, this was as serious a breach as the release of information which is obviously confidential in the sense of not being available elsewhere, such as social insurance numbers, the advance price of products, or convenience store management information. This is the part of the case that deserves scrutiny.

74. The company says Lease knew what she did was wrong. There are differences in evidence about how much Lease said about acknowledging wrongdoing; we have concluded that, given the extensive overlap in the versions of the conversation at the termination interview that the differences are those which are the natural result of differences of point of view and the passage of time. Both sides agree Lease gave the impression she had read the policy and said she was sorry as well as that she said it was only a list of names. The latter remark is a good indication that she did not think it was a very serious offense. If she elaborated on her saying she was sorry to the extent Gingrich suggests, it does not change very much; the decision to terminate was contingent only on whether or not she admitted to taking information from the front office.

75. Is it more probable than not that the company's decision to terminate rather than deal with the breach of policy in a less severe way was not at all motivated by a desire to interfere in the progress of the nascent organizing campaign? In attempting to answer this question, there are two areas which are of concern.

76. Firstly, there was apparently no consideration given to Lease's good work record as a mitigating factor, or any consideration given to measuring the severity of the penalty to the severity of the breach. We do not share the view that the company could only have maintained the integrity of its confidentiality policy by firing Lease. She had a discipline free record. It is clear that in other areas the company started with reprimands and worked up, for example in the case of Cindy Jones' discipline for extended breaks, which the company described as stealing from the company. The employee handbook clearly describes theft as cause for immediate discharge; the use of alcohol or drugs at work or reporting to work under the influence is said to be grounds for discipline up to and including termination. Immediately following the portion of the booklet dealing with those rules is the policy on confidentiality, which does not indicate that it is an automatic firing offense. The only evidence about verbal reinforcement of the confidentiality policy with employees is on the pricing aspect. There was no evidence that the company had been clear with employees on what information was considered confidential. It is not at all surprising that an employee might think that phone numbers of co-workers, many of whom she was friends with or had grown up with, were not the real focus of the policy on confidentiality. We do not share the view that what Lease did was comparable in severity to what the convenience store manager apparently did - release corporate information about the details of how Sobeys operates.

77. The other troubling aspect is the information given at the meetings to inform employees about the firing. Not only was the company's position given, but the opportunity was taken to offer information that could only have discouraged any remaining interest in unionization. We will deal with the meetings further below. If the company did not intend to send a message about union

organizing along with the discharge of Lease, it is difficult to understand why Gingrich and Bratton took the occasion in separate meetings to tell employees why they did not need a union in very similar terms.

78. A similar, but related concern exists as to the ban on Lease, a significant negative consequence, which was not persuasively explained. Wood said it was for trespassing; more senior management said that a ban would be considered where an employee was disrupting other employees. No matter which version of the evidence about cleaning out her locker is accepted, there was no suggestion that Lease disrupted anything or that she had been told that she could not be in the coffee room.

79. These factors leave us unpersuaded that the severity of the response to Lease, and the lack of any consideration of other penalties, was not at least in part motivated by a desire to discourage what she was doing when she made the list - organizing a union. Accordingly, we are of the view that the company has not satisfied its onus on the matter of the penalty imposed on Lease, and that in this respect a finding that they have breached the Act is in order. Lease is to be offered reinstatement and compensated for her losses due to the firing, with interest thereon according to Practice Note 13. In this regard, we did not hear any submissions on what might have been an appropriate disciplinary response short of discharge, and remit this to the parties for consideration. If they are unable to resolve this issue we will receive written submissions on the point.

Taylor's Denial of Access

80. What was the company's reason for denying Taylor further access to the front office? Wood and Gingrich, with Hagan's concurrence, decided that she could no longer be trusted. Wood said the reason was that she was working with Lease in ranking employees and there was confidential information in the front office. Hagan said the reason was that she was aware of a breach of policy and had not reported it. Taylor's uncontradicted evidence is that she did not know where Lease had gotten the information at the time she ranked the employees. There was no evidence that any of the managers inquired as to whether Taylor knew where the information came from. It appears that they assumed that she did. There was no evidence that it was expected that employees would report any breach of policy that they saw occurring.

81. It was Hagan's evidence that when he learned at the April 8 interview that all Taylor had done was rank the employees, there was nothing left to discuss and he ended the meeting. Wood and Gingrich's decision apparently came after this. The evidence is unclear as to which of the two initiated the decision.

82. In considering the motivation to exclude Taylor, we have considered the evidence of Wood's prior interactions with her on the subject of the union. We accept Taylor's evidence about Wood's apparent disbelief of her denial of having attended the union meeting. She was a very straightforward witness; her account of her approach to Wood the night after he had asked her about the meeting was credibly given. Although Wood does not recall that exchange at all, her account of his responses is consistent with the evidence he gave before the Board. Even by the date of the hearing, he was speaking of his disappointment at the fact that someone he had trusted had not come to him about her problems rather than going to a union meeting - he still appeared to disbelieve what she had denied to him several times. We infer from this line of evidence that Wood very likely had started to distrust Taylor weeks before April 8, from the time of his concerns about her attendance at a union meeting. There is no evidence that Hagan had any part in or knowledge of the earlier root of Woods' distrust; it was clear that the idea to exclude her from the front office was not his, although he concurred with it, because he apparently believed she knew where the information on the list came from.

83. We are aware that Wood maintains that his only concern was for solving problems, and that was why he was inquiring of Taylor about her supposed attendance at a union meeting. We agree with union counsel that this proposition would have a lot more credibility if he had asked her if there were any problems. Wood's distrust appears to have been originally rooted in his information from Martin and MacIntosh about the mere attendance at a union meeting, and reinforced by the fact that Taylor ranked employees with Lease. It was not generalized distrust, or one would have thought she would not have been working with cash. The exclusion from the office meant that she would be working exclusively as a cashier.

84. If the only reason for the exclusion was the failure to report Lease's violation of company policy, it is hard to understand why Taylor would not have been told that - and that is not the reason Wood gave for the exclusion. The absence of any explanation to her adds to our concern that another message may have been intended as well. Given the unexplained exclusion on the heels of her admission that she had ranked people from the union, it would be natural for her and others to believe that she was being punished for having done just that. Wood said that the basis for the decision was the fact that Taylor was ranking people with Lease. Hagan had apparently been of the view that there was no problem with ranking employees, a view the Board shares, as it is pure union activity. It is clear that the ranking played a part in at least Wood's considerations in deciding on the exclusion from the office. It is likely that the distrust dating from the time Wood started to believe that Taylor attended a union meeting also played a part in his thinking. It is clear that Wood had been in touch with Gingrich about all these matters; Wood's concerns may thus have become part of his mind-set as well. In all the circumstances of this case, we are of the view that it is likely that association with a union campaign was at least partly the basis for the new found lack of trust in Taylor, and that this warrants the inference that anti-union animus played some part in the decision. Thus we find that the employer breached the Act in excluding Taylor from the office.

85. What is the appropriate remedy for this breach? If Taylor were back in the position she would have been before this breach, she would not have been excluded from the office, and we find it unlikely that she would have quit. It is clear that it was the employer's lack of trust in her, as manifest in the exclusion from the office, that caused Taylor to quit. We are of the view that Taylor is entitled to be reinstated with access to the office on the same basis as prior to the events complained of, if she so wishes. We remit the question of compensation for Taylor to the parties, and will resolve this issue by written submissions if the parties are unable to resolve it.

The refusal to rehire Leslie

86. This portion of the complaint must be dismissed. There is no evidence to link Leslie to any union activity. The only evidence on which an inference is argued to be drawn of anti-union motivation for this action was the friendship which could be inferred from knowing Lease and Taylor and the latter's offer to take the uniforms to Leslie. Martin's and Wood's uncontradicted evidence about the conditions in the store which lead to Wood's veto of the idea was credible, as was Martin's evidence about why it took until April 8 to inform Leslie - she had put off an unpleasant task. We find no basis for the finding the union requests on this portion of the complaint.

The meetings with employees

87. In deciding where the line lies between free speech and undue influence in section 65, the Board has held that a suggestion that unionization will be accompanied by loss of jobs will violate section 65 whereas an expression of preference to remain non-union, without more, will not. See, for example, *Knob Hill Farms, supra*, and *Thermogenics*, [1992] OLRB Rep. February 224. In the former case, the communication included statements to the effect that the employer had

achieved its success without the intervention or interference of a third party, and that employees did not have to join a union or talk to its representatives. The Board found that this was likely to be taken only as a communication to the employees that the employer preferred to remain non-union and was therefore protected as free speech. On the other hand, in *Thermogenics*, the communication went further and linked unionization with adverse effects on job security and was found to cross the line. In dealing with the employer's argument that the message was simply factual and not a threat in *Seven Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87, the Board said this:

...In assessing employer conduct the Board is obliged to take into account the responsive nature of the relationship of employees with their employer. Predictions of what the future holds may constitute threats or promises, if it is in the power of the employer to make the predictions come true and the employees perceive in their employer a willingness to exercise that power in response to the success or failure of their attempt at unionization.

The Board further observed that such communications must be assessed as a whole from the point of view of the typical employee receiving it. We will deal with the departmental meetings, the Lynn presentation and the Grimsby and Woodstock meeting in turn, in light of these general considerations.

88. There is little question that if the company had just told the employees of the company's position on Lease's firing, there would be no basis for this portion of the complaint. What makes the matter problematic was Gingrich's decision to take the opportunity to tell employees his view on how favourably their conditions of employment compared with the competition which included references to the closure of unionized competitors and restrictions on work for part-timers in unionized workplaces. He said that it was a profitable company that provided job security and reminded employees of the example of Dominions, a unionized store which had recently closed in Stratford. He said in answer to a question that unions did not really help. It is not disputed that he made a clear statement that employees could join a union if they wished. This will not be a sufficient mitigating factor, however, if the message delivered is that you are free to join a union, but you risk losing your job as a result.

89. Although Bratton says he was only giving his personal opinion when he made very similar remarks to those of Gingrich at another meeting, he was chairing the meeting as acting store manager, and thus we doubt that the average employee would have taken his remarks as anything other than the company's position. He apparently did not make the pointed references to the closure of a close unionized competitor as Gingrich had, but delivered a similarly negative message about unions.

90. Although it is not unusual to have meetings at which employees are required to attend, part of the context of these remarks is that they were made at compulsory meetings on company time. As well, the very subject matter of the meetings - Lease's firing for being prepared to release confidential information to the union - made the whole issue of the company's opinions on unions highly sensitive. The material itself is borderline. It referred to a real case where jobs were lost at a unionized competitor. However this was in a context in which, as we have said earlier, it is hard to understand why the remarks were being made at the same time as telling people Lease's discharge had nothing to do with the union unless a message about unionization was being delivered at the same time. Gingrich's statements about the restrictions on part-time workers were possibly a misunderstanding of the division in standard full-time and part-time bargaining unit at the line of 24 hours. What hours a part-timer works is not something that is determined automatically upon unionization. The average employee would likely have taken the remark as a serious problem for part-timers and to the extent part-timers depended on the hours over twenty-four they worked at

Sobeys, a threat to their livelihood. Gingrich was not corrected, whereas Bratton was on this point. All of this was punctuated with the clear statement that employees had the right to join a union. We are of the view that any doubt about whether the remarks made at these meetings goes over the line into undue influence is resolved by the cumulative effect of these meetings and the meeting at which Lynn gave his presentation.

91. In reading the material presented by Lynn set out above, we are of the view that the average employee would interpret it as an indication that unionization would lead to the demise of Sobeys along with the economic casualties Lynn picked out for specific reference. For example, this is a likely interpretation of the reference to not allowing “a competitor or organization to dictate our terms and conditions of employment... this would be irresponsible”, “We really do not want to talk about the future in this type of environment...”, immediately preceding the list of grocers who had seen major difficulties. This was apparently followed in the oral presentation with a reference to the fact that it was not just employers, but also employees who were sometimes told what to do with their money. All of this was couched in language which referred to competitors and shareholders as well as unions, and this is why the company did not see the material as sending a negative message about unionization. The material is subtly worded. If read very technically, one could adopt an interpretation that this material was not for the purpose of sending a message that unionization would have a decided detrimental effect on job security. However, that is not the common sense reading of it in the context of a meeting aimed at employees in the midst of an environment where the competition is highly unionized, and not one we think the average employee would take. In context, it is perfectly clear that “third parties” refers to unions. The passage was likely to be read as it being unthinkable to the company that it could operate with a union. Thus, we are of the view that this material, delivered at a compulsory meeting, with the comments about dues following it, together with, and within a short time after, the departmental meetings is over the line into undue influence. It links unionization with negative effects on job security and makes dire predictions about the future dealing with “third parties” on working conditions.

92. Thus we are of the view that the company breached section 65 in using undue influence at the series of meetings at which it linked unionization and negative effects on job security in a sensitive context where employees would likely conclude that Sobeys could make these negative effects a reality if unionization occurred. As a remedy for this breach and the effects on the union of the breaches found above we order the posting of the attached notice for sixty days in conspicuous places on the premises of the Stratford store.

93. We have no information other than Gingrich’s about the Woodstock and Grimsby meetings and his account of the meetings does not disclose a breach of the Act. This portion of the complaint is therefore dismissed.

Hiring Practices

94. As to the complaint on hiring practices, there was no evidence that hiring decisions were made on the basis of affiliation or interest in unions or that there was undue influence exercised by any questions asked. This portion of the complaint is dismissed. However, clearer practices in this area might avoid the perceptions shared by the union witnesses in this regard.

95. The union also asked for the return of its organizing documents. An undertaking by counsel to the employer dealt with this during the course of the hearing. We would ask counsel to attempt to deal with this themselves. If such efforts are unsuccessful, we will receive written submissions on this point.

96. In summary then, the complaint is allowed in respect of Lease, Taylor, the departmen-

tal meetings and the Lynn presentation. It is dismissed in respect of Leslie, Jones, the Woodstock and Grimsby meetings and hiring practices.

DECISION OF BOARD MEMBER R. M. SLOAN; September 16, 1992

Introduction

1. With respect I strongly dissent from the majority decision.
2. The triggering event for this complaint is the use by J. Lease and C. Taylor of employee *names* and *telephone numbers*, kept under company control, in the preparation of a document to be transmitted to the United Food and Commercial Workers' International Union.

Privacy and Confidentiality of Employee Information

3. There can be no argument against the right of Sobeys' employees to expect that the use of their names, telephone numbers, and other personal data, will - within the reasonable bounds of operating a business - be vigorously protected by their employer. Indeed Sobeys, like all employers, is obligated to exercise strict control of this information to ensure, insofar as is possible, that the information is used only for legitimate business purposes.
4. The issue is particularly important and significant at Sobeys in view of the large number of women employees, for very obvious reasons. As a matter of fact, a number of employees expressed their concern and displeasure to the company upon learning that their telephone numbers were to be given to an unauthorized third party.
5. We learned from testimony that Sobeys does take its responsibilities in this area very seriously and records its instructions and commitment to its employees on pages 6 & 7 of its employee handbook which reads, in part;

**CONFIDENTIALITY OF
COMPANY INFORMATION**

Due to the competitive nature of our business, employees must not use any internal information about the affairs of the Company, *its employees* and/or benefits, or its clients and suppliers for personal gain *or to benefit third parties, competitors or any other individuals*. *Employees must respect the confidentiality of information regarding the Company's operations, its employees, clients, and/or affiliated retailers.*

Confidential information must not be revealed to any unauthorized people. In turn, the Company recognizes employees' rights to privacy, and will not release confidential information about employees without authorization. (Emphasis added)

6. While the material in this employee handbook with respect to *the confidentiality of employee information* and the prohibition against employees revealing such information "...to any unauthorized people", is abundantly clear, unequivocal, and unambiguous, the majority decision appears to accept the submission of the applicant that this whole section in the handbook really applies only to "commercial" information.
7. Even if there was no written rule about giving out such confidential information - in this case employee names and personal telephone numbers - the respondent would still be justified in taking the action it did. It is just plain common sense that such information should not be given to

third parties without the knowledge and approval of the employer and the employees. It should be noted that this form of protection applies equally to the grievors as well as to other employees.

8. Sobeys' employees have the right to expect that their employer will act responsibly and will not permit the dissemination of such personal data to third parties - whoever they may be - without prior approval by their employer, or as is occasionally done at Sobeys by the employees themselves, depending upon the circumstances.

9. What if the company did not take decisive action and it later became known following some tragedy or other untoward event that the company knew that the employees telephone numbers were in the hands of a third party but it took no action to draw the matter to their attention. What guarantee is there with the list, floating around obviously unsecured, that the information would not fall into the hands of some person who would use it for *questionable purposes*?

The applicant's argument that had the information been collected without company authorization for a social event, no penalty would have been imposed is, in my view irrelevant and without merit (see para. 50 of the majority decision).

10. In support of the employer's position with respect to the confidential and private nature of the information assembled by J. Lease and C. Taylor for transmittal to the union, I refer to the *Freedom of Information and Protection of Privacy Act* which, although it does not apply to the private sector, does uphold the same principles that are enunciated and published by Sobeys:

Part III of the *Freedom of Information and Protection of Privacy Act* deals with the protection of individual privacy.

This Act provides, in part;

that standards and controls in the collection, retention, use and disclosure of personal information are necessary.

The Act also requires that personal information held by institutions be protected from unauthorized use/disclosure and regulates the collection, retention and disposal of personal information. (Emphasis added).

11. The applicant asked the Board to conclude that the policy on telephone number security was not all that strictly enforced. It is worth noting that in order to run the business effectively without having to impose unnecessarily stringent controls, the employer has to rely upon the honesty and integrity of its employees when dealing with what is obviously personal employee data. Without that support, no system would be secure.

12. The company in the past, on the one occasion where it was faced with a breach of the rule against releasing specific information to a third party - also terminated that individual's employment. The action taken in this case is consistent with the disposition of that previous occurrence.

The Involvement of J. Lease and C. Taylor

13. One of the most significant pieces of testimony which does not appear to have been considered by the majority decision, took place at the hearing held on Thursday, January 9, 1992 when counsel for the respondent, asked Ms. Lease a series of questions with respect to the pleadings filed with the complaint on May 8, 1991 - specifically about Schedule C, and the follow-up letter from the applicant dated June 3, 1991, in which some corrections were made to the original Schedule C. It is important to take cognizance of the fact that Schedule C and the June 3, 1991 let-

ter are the applicant's own documents. When asked by counsel for the respondent whether or not Schedule C and the June 3, 1991 letter accurately set out the matters being complained about, J. Lease replied that "yes, they did" and she agreed that she had reviewed Schedule C *after* the complaint was filed and that as a result of her review the June 3, 1991 letter was issued with corrections to the original pleadings.

14. Given that the pleadings through the above testimony became evidence before the Board it is appropriate to extract pertinent portions as they relate to various matters in this case. For example in paragraph 3 of Schedule C we learn that Ms. Taylor was not in fact a passive, innocent, in the matter of the preparation of the list of employee names and telephone numbers, (see paragraph 14 of the majority decision) but played an active role upon the specific request of a union representative. Paragraph 3 reads, in part;

3. On or about March 21, 1991, the grievors Jackie Lease and Chris Taylor were requested by a representative of the applicant union to compile a list of names, addresses and telephone numbers of all employees of the respondent, and to indicate the likelihood that each employee would be a union supporter. They were provided forms by the applicant for this purpose. The grievors Lease and Taylor duly compiled a list of approximately 90 employees on the forms provided by the Union...."

We learn further from Schedule C (amended) in paragraph 8:

8. At approximately 2:00 p.m. the grievor Taylor went home for her lunch break. Upon returning home, she learned that the grievor Lease had been fired. After considering the circumstances set out above, the grievor believed that she was going to be fired imminently. In order to avoid the humiliation involved in a termination, the grievor notified the Employer that afternoon that she was resigning from her position with the company.

15. When confronted with the list J. Lease readily admitted to her part in its preparation, and during the meeting with T. Gingrich and B. Hagan clearly left them with the impression that she was aware of the company rule that prohibits the release of such information to a third party and by her own admission agreed that she said to these two persons that she was sorry for what she had done (referring to the compilation of the list).

16. As J. Lease offered no acceptable explanation, when invited to do so, as to why she breached this company rule - her employment was terminated.

17. The potential consequences that could flow from a breach of this rule were of significant importance as to justify termination.

18. The Board heard testimony from the respondent that in view of the special circumstances surrounding the discovery of the list, that is, the obvious union involvement, that the employer exercised special care to ensure that any action that they took would not be in breach of any statute.

19. The company's decision to terminate the employment of Ms. Lease was appropriate for justifiable reasons, including:

- The rule Ms. Lease clearly breached was a reasonable one; the rule was published and made available to Ms. Lease so that she knew or should have known of its existence; J. Lease signed the employee handbook under the section which reads:

We, the undersigned, acknowledge that proper review of all policies, procedures and

beliefs of the Company has been completed with, *and understood by*, the undersigned employee. (Emphasis added).

“Jackie Lease”
(Signature)

“638”

“G. Martin”

“B. Wood”

- J. Lease's actions in recording the names and telephone numbers was done in a clandestine, surreptitious manner - including the removal from G. Martin's desk of a “black book” - which was kept under lock and key - to obtain additional telephone numbers - indicate beyond question that J. Lease and C. Taylor knew that they were doing was wrong, and that they knew that what they were compiling was more than “... just a list of names”.

- Discharge was clearly an appropriate response to this serious breach of the company rule.

20. The applicant has chosen to ignore the fact that in addition to recording employees' telephone numbers, J. Lease and C. Taylor also recorded the employees' surnames. If as J. Lease maintains the telephone numbers could easily have been obtained from the telephone book (this in fact turned out to not be the case) it goes without saying that she and C. Taylor required the employees full names to begin with. From the evidence adduced this information was available only from the confidential list in the front end office. The other lists posted in other areas of the store did not contain such information, but as testified to by J. Lease most of the lists posted in the various departments contained only first names. *J. Lease also testified that she was not aware of any lists of employees names posted anywhere else in the store that contained employees names and telephone numbers.*

21. On questioning by counsel for the respondent J. Lease agreed that in compiling the list of employees' names and telephone numbers for the trade union, she used two sources of company-controlled information. The list in the front end office and a black book belonging to G. Martin the Front End Manager - which book was kept securely locked in Ms. Martin's desk. J. Lease testified that she unlocked the desk, removed the black book and used information contained therein to assist her in completing the list. This behaviour surely disputes any claim by the applicant that Ms. Lease was engaged in innocent activity. J. Lease knew exactly what she was doing and clearly knew that it was wrong.

22. It is quite obvious from the applicant's own pleadings that Ms. Taylor terminated her employment voluntarily believing, incorrectly, that she would be fired. Such belief I contend could only be based upon the active role she played in preparing, without authorization, the list of names and telephone numbers for use by a third party.

23. It is clearly wrong then to “reinstate” Ms. Taylor to a position that she voluntarily vacated - the employer had already assured her that her job was not in jeopardy and that she would continue to be employed as a part-time cashier.

24. The employer did not remove Taylor from front end office duties because she ranked employees for the union - as stated in paragraph 59 of the majority decision. Taylor was removed from front end office duties for her part in, and her knowledge of, the preparation of the list of names and addresses which had been prepared for transmittal to a third party contrary to stated company policy. Her behaviour in assisting in the preparation of the list and her knowledge of the unauthorized use of the list raised important questions about her future trustworthiness.

25. J. Lease was employed in a position of some trust at the time that she prepared the list

for transmittal to the union - both she and the company viewed her to be in such a position by virtue of her job as Assistant Front End Manager (her reason for passing on to G. Martin information about C. Taylor and the "union meeting" was given by J. Lease who felt compelled to do so in view her perception of her function as supervisory). This position of trust gave J. Lease access to confidential information and the company had every right to expect that she would not abuse that trust - access to the front end office list was available to only a limited number of employees in the normal course of their duties.

Anti-Union Animus

26. It cannot, and should not, be inferred that because the majority of employees who work for Sobeys in their various locations have chosen to remain union-free, that the employer is anti-union. By providing an employment atmosphere to employees that is attractive and enlightened, which may have the effect of eliminating any interest employees may have in union representation, the employer, by investing in what they have described as one of their most important resources - their employees - cannot be judged on the basis of the employees free choice with respect to union representation - to be anti-union.

27. Let's look at Sobeys' performance at the Stratford location with regard to its views on unionization:

a) We know that there was a union presence right from the beginning - mainly verbal accounts, but occasionally some physical evidence in the form of hand-outs (leaflets). The applicant did not make a single allegation that the employer reacted in any negative way to any employees as a result of these union overtures.

b) We know that Ms. Lease approached Ms. Martin to advise her that Ms. Taylor was involved with a union - whether through an invitation to a meeting or that she actually attended a meeting is immaterial - the point is that Ms. Taylor's position within the organization was not affected adversely. J. Lease was obviously confident that her friend C. Taylor was not placed in any jeopardy by the revelation of that information to Sobeys' supervisory personnel.

c) The company's hiring practices show that there is clearly no basis for criticism - with respect to anti-union animus - paragraph 94 of the majority decision confirms this.

d) The employee handbook, where if the company was anti-union as the majority decision suggests, would be expected to reveal - even if in a subtle and oblique way such anti-union feelings, contains not one single reference throughout its nineteen (19) pages to a union(s) or even to third parties.

e) The document entitled "Realities of the Current Canadian business Environment and Economy" is a model of an employers attempt to communicate on a high plane - a compliment to the employees intelligence, and in thirteen pages of data and comment the word "union" is mentioned once - and then only in conjunction with "... shareholders, employees, and unions..." in the context of other businesses experience. The company was not challenged on the accuracy of this particular statement, nor the applicant did not allege that the statement in this document was misleading, untruthful, coercive, intimi-

dating, threatening, contained promises or used undue influence - they simply objected to the use of the word "unions" in the section entitled Definition of Competition - without adducing any evidence to show why its use was not appropriate in the context in which it was used.

28. The meetings held with the employees subsequent to J. Lease's termination were not in the least unusual for Sobeys operations but were wholly consistent with its stated communications policies and ongoing practices. The fact that some discussion about unions took place is quite understandable in view of the purpose for calling the meetings in the first place. It is of significance to note that any comments made by the supervisors were made in response to direct employee questions and while the majority have chosen to find some of these comments to be of concern to them the ultimate advice to employees that they do in fact have the right to be represented by a union overrides any adverse interpretation they place upon the supervisors legitimate, appropriate, and certainly by Board standards acceptable comments.

29. What was the situation on April 4, 1991 the day the decision was made to give J. Lease an opportunity to explain the circumstances relating to the preparation and disposition of the list - surely the crucial date for determining if there was any anti-union animus is that date and not subsequent unrelated events. The decision to terminate J. Lease's employment was made after all the facts were reviewed and was made in consultation with and approval of a senior level of management.

The Right of Free Expression

30. Section 65 of the Act explicitly permits an employer to make known its views with respect to trade unions with the words "... nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use *coercion, intimidation, threats, promises or undue influence*". In my view none of the testimony or evidence placed before the Board in the nine (9) days of hearings even remotely suggests a violation of this section.

31. With respect to the majority finding that the respondent violated Section 66 of The Act by holding several meetings and voicing its view that a union is not needed at Sobeys (the majority decision sees this as cause to find a violation of the Act while acknowledging that the employer stressed the rights of the employees to elect union representation (if that is their wish) I wish to note:

32. I cannot agree with what appears to me in the majority decision to be the intent of paragraph 90, that the combination of a compulsory meeting, attendance at which does not result in a loss in wages, and a discussion on the topic of unions contributes in some way to a finding of undue influence. The subject matter with respect to union representation at other employers was factual and did not contain any suggestion of a threat, or coercion, or intimidation. In fact, as the majority decision states, "All of this was punctuated with the clear statement that employees had the right to join a union". This is clearly not the behaviour we would expect of an employer who the majority decision would have us believe is anti-union.

33. As stated in the previous paragraph the meetings held with employees were in keeping with employer normal practices. To have not held these meetings could raise a further allegation - that by not holding the meetings and leaving employees in the dark as to why J. Lease was fired the employer was attempting to deliver an ominous message to all employees that J. Lease was fired for union activity.

34. In *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737 it is recorded in para.
27:

Perhaps the most common employer response to an organizing drive is a statement of opposition to unionization. *The Board has held in numerous cases that the expression of such opinions does not violate section 64.* The clearest explanation of the rationale for this results is found in *Playtex Ltd.*, [1972] OLRB Rep. Dec. 1027, at para. 5:

Apart from any electioneering or propaganda published by an employer, it is to be assumed that employees recognize that the employer is not usually in favour of having to deal with the employees through a trade union. Accordingly, it ought not be a surprise to the employees when the employer indicates that he would like to have the employees vote against the trade union. An invitation to employees to vote against the trade union delivered in writing in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statement cannot be characterized as undue influence within the meaning of section 56 of the Act. Indeed, employees might consider the fact that the employer is opposed to dealing with them through a trade union as evidence of the fact that union representation would work to the detriment of the employer and to the advantage of the employees.

See also *Formfit International*, [1966] OLRB Rep. June 193; *Standards Brands Limited*, [1972] OLRB Rep. June 653; *Seven-Up (Ontario) Limited*, [1970] OLRB Rep. May 198; *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 60.

Further Board jurisprudence supporting the employers right to free speech with respect to its views on remaining union-free can be found in *Knob Hill Farms*, [1987] OLRB Rep. Dec. 1531 we note the following in para. 22:

It was argued by the Union that the letter from Stavro had an impact on employees during the campaign. It was suggested that underlining the word "don't" in paragraphs 3 and 4, Stavro communicated to employees the *Employer's desire to remain union-free*. We have examined carefully the substance of Stavro's letter *does not constitute a contravention of of the Act*. In our view, the letter does not come within the prohibitions in section 64 of the Act but rather *comes within the caveat to the section guaranteeing employer free speech*. In *Dylex Limited*, [1977] OLRB Rep. June 357 in paragraph 19, the Board noted that *employees recognize that employers generally are not in favour of having to deal with employees through a trade union, and therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union*". Stavro's letter does no more than convey to the Oshawa employees that Knob Hill prefers to remain non-union.

35. In *DeVilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678 in para. 12 the Board noted:

In this case the following factors are relevant in our determination of whether there was any anti-union motive for the discharge: 1) the existence of a pattern of anti-union activity; 2) the extent of the respondent's knowledge of the existence of union activity and of the employee's involvement in that activity; 3) the manner in which the employee was discharged; 4) the credibility of the witnesses.

In considering the evidence adduced before the Board in our case - it's abundantly clear that: 1) There was no pattern of anti-union activity, indeed there was no anti-union activity whatsoever; 2) Up to the moment that the list was discovered there was no direct knowledge of union activity at the Stratford Location. The employees' (Lease and Taylor) involvement in using the list of employees names and addresses for unauthorized purposes is of course the just and reasonable cause for the action the respondent took. 3) The manner in which the discharge took place was exemplary - the evidence shows that the circumstances were fully explored; that management, at a very senior level in the organization, gave full consideration to the potential consequence of their action; that J. Lease and C. Taylor were given a full opportunity to explain their behaviour; and 4)

on the matter of credibility, I am inclined to favour the version of events testified to by the respondents witnesses - where there is conflict with that of J. Lease and C. Taylor. The differences in the testimony given by the latter and the statements contained in the pleadings are too obvious to ignore and bring into serious question the credibility - even allowing that such differences may be due to difficulty in accurately recalling events - of the witnesses J. Lease and C. Taylor.

Summary

36. There is not a scintilla of direct evidence to support a finding that the respondent was ever anti-union and most certainly made its decisions with respect to J. Lease and C. Taylor without anti-union animus.

37. I believe that the respondent has discharged its "reverse onus" obligations under section 91(5) of the Act and has proven that:

1. The termination of J. Lease and the minor adjustment to C. Taylor's duties were both warranted.
2. The actions taken by the company were without anti-union animus.

38. In my view the majority decision exceeds the Board's jurisdiction - we were not asked to find that the employers policies prevented employees from making a choice with respect to union representation - there was no organizing drive, there were no membership cards signed, and it is safe to conclude from the evidence that, in view of the poor support that the union was confronted with as recorded in the evaluation of employees' interest, that the matter of union representation would not have been pursued. There was no union organizing drive and from the evidence before the Board there very likely would not have been any such drive in view of the lack of support for a union - the document which rated the eighty seven (87) employees in terms of support for the applicant clearly shows that only eight (8) or less than 10% were believed to be at all interested in the union.

39. The decision to terminate J. Lease was made at a very senior level in the Sobeys organization before any of the alleged anti-union incidents occurred. The Board's responsibility in these circumstances is not to apply events retroactively (the various meetings) but to focus on what were the circumstances leading up to and including the date of termination.

40. Does the majority decision stand for the proposition that if there is a union presence no matter how periphery or remote, employers are prevented from taking disciplinary action no matter how blameworthy is the conduct?

41. If as the majority finds there was anti-union animus in the termination of J. Lease how can the majority then advise the company to apply a lesser form of discipline when they have been found to have violated the Act. Paragraph 79 of the majority decision agrees that notwithstanding the finding that anti-union animus influenced the decision to discipline J. Lease, the employer would be justified in imposing some other form of discipline. The proposal, in my view, clearly supports the employer's right to impose discipline, for just cause, consistent with the pertinent provisions of the Act.

42. Again, does the decision stand for the proposition that if employees freely exercise their right of free choice with regard to union representation for whatever reason(s) and that choice is to remain union-free, then the Board can infer anti-union animus on the part of the employer regard-

less of what circumstances arise? Surely that can't be the message that the majority decision is meant to convey, but that may well be the one that is understood by this decision.

43. The respondent's position requires the Board to select only that evidence which supports the union's allegations and to pluck inferences out of the air from that limited evidence, ignoring the total context of events. It is my strongly held view that the evidence cannot support any finding of either anti-union animus or a violation of the Act.

44. For all of the above-noted reasons I would dismiss the complaint in its entirety.

45. Finally, with respect to the order to post a notice as per paragraph 92 of the majority decision, I refer to paragraphs 23 to 25 inclusive, in the *Call-A-Cab* dissent, [1991] OLRB Rep. April 448 and conclude that these comments also apply in this instant case:

23. Further, the humiliating and demeaning nature of the order requiring the employer to post a notice "confessing" to a breach of the *Ontario Labour Relations Act* is punitive by any social standard that we may apply.

Such a measure is not required of persons or organizations in any other legal context, of which I am aware. The effect of this order can only be counter-productive to any attempt to establish a workable labour relations climate.

24. The written decision in all Labour Board cases is a public document available to any citizen who wishes to obtain it and read it, and from which individuals can acquire full knowledge of the decision and any dissent.

25. The fact that the Board's practice with respect to these notices has been in vogue at the Board since 1976 makes it no less intrusive. I believe that its use should be abolished - or if that is not in the cards, then its use should be restricted to only those instances where unanimous decisions of Board panels agree that circumstances warrant such a serious measure. Certainly this case does not fall into that category.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION, LOCAL 1000A HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT IN RESPECT OF THE SEVERITY OF THE PENALTY TO JACQUEE LEASE FOR RELEASING CONFIDENTIAL INFORMATION, THE EXCLUSION OF CHRIS TAYLOR FROM WORKING IN THE OFFICE, AND COMMUNICATIONS ABOUT UNIONS IN MEETINGS WITH EMPLOYEES. COMPLAINTS ABOUT DISCIPLINING CINDY JONES, FAILING TO REHIRE BARB LESLIE, OUR HIRING PRACTICES AND MEETINGS AT GRIMSBY AND WOODSTOCK WERE DISMISSED.

THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE.

SOBEYS INC.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 16th day of September, 1992.

3731-91-R; 3755-91-U Labourers International Union of North America, Ontario Provincial District Council, Applicant v. **Stephens and Rankin Inc.**, Respondent v. Christian Labour Association of Canada, Intervener; Labourers International Union of North America, Ontario Provincial District Council, Complainant v. Stephens and Rankin Inc. and Christian Labour Association of Canada, Respondents

Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the Act - Certification application dismissed as being untimely

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

APPEARANCES: *S. B. D. Wahl*, *L. Curto*, and *P. Settimi* for the applicant; *W. J. McNaughton* and *Ian Mckie* for Stephens and Rankin Inc.; *Elizabeth Forster*, *Hank Beekhuis*, *Bert Wierenga*, *Fern Bastien* and *Marc Noel* for Christian Labour Association of Canada.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER W. A. CORRELL; September 3, 1992

1. These matters are an application for certification in which a pre-hearing vote was held on March 19, 1992, and a complaint of unfair labour practice. The ballot box remains sealed, due to a number of outstanding issues, not the least of which is the position taken by the respondent and the intervener that this application is untimely.

2. A brief history of the matter is in order. On February 21, 1992, the applicant (also referred to in this decision as "the Labourers") made application for certification with respect to a unit of employees covered by a collective agreement between the respondent (also "the company" or "Stephens and Rankin") and the Christian Labour Association of Canada ("CLAC"). At the time this application was made, the parties were already involved in a previous application for certification filed by the Labourers on March 5, 1991. That previous application also included the holding of a pre-hearing representation vote, on April 9, 1991. As of February 21, 1992, the ballot box in this vote remained sealed. As will be elaborated upon later in this decision, the application of March 5 ("the first application") was ultimately dismissed by the Board on June 11, 1992.

3. There was no dispute as to the timeliness of the first application. The company and CLAC were parties to a collective agreement effective from May 1, 1988 to April 30, 1991. On August 16, 1991, the company and CLAC signed a renewal collective agreement effective from May 1, 1991 until April 30, 1994. In the present application, the Labourers take the position that this collective agreement constitutes a violation of section 81(2) of the *Labour Relations Act* and is null and void. The Labourers also rely on sections 65, 67, 71, 81 and 91 of the Act. The unfair labour practice complaint was filed a few days later and raises essentially the same issue, relying as well on section 49 of the Act.

4. When these matters came on for hearing, the Board ruled, after hearing submissions from the parties, that it would deal with the issue of the timeliness of the application before proceeding with the rest of the issues, and in particular, would hear the challenge raised by the Lab-

ourers as to the validity of the collective agreement signed in August of 1991, in order to determine whether this agreement ought to bar the present application. There is no dispute that if the agreement is a valid agreement, this application would be untimely since it is not made during the periods specified in section 5 of the Act. Clearly, if the agreement is found to be valid, this will dispose of the application for certification. This appears to this panel to be a compelling reason to determine this issue at the outset.

5. The unfair labour practice complaint filed by the Labourers and a letter from counsel of March 18, 1992, set out the material facts on which the Labourers rely in their request for a declaration that the most recent collective agreement between the company and CLAC is void. The portions of the complaint on which they rely with respect to this issue are:

- (a) The Respondents, Rankin and CLAC, were bounded by a collective agreement dated June 10, 1988 and expressed to be effective from May 1, 1988 until April 30, 1991. In February, 1991 the Complainant commenced its organizing campaign with respect to the employees of the Respondent Stephens and Rankin Inc. ("Rankin").
- (b) On March 5, 1991 the Complainant filed an Application for Certification with respect to the employees of Stephens and Rankin Inc. captioned as O.L.R.B. File No. 3174-90-R. This Application for Certification was acknowledged by the Ontario Labour Relations Board by letter dated March 11, 1991 to the Complainant which acknowledged service of the Form 7 Notices to Employees being sent to the Respondent Rankin for posting. Attached is a copy of the Application for Certification dated March 5, 1991.
- (c) Rankin circulated a letter dated March 4, 1991 subsequent to March 11, 1991 to all employees in the bargaining unit expressing its preference and support for CLAC over the Complainant. Attached is a copy of the circular dated March 4, 1991.
- (d) By letter dated March 7, 1991, the Complainant protested and put a stop to the expression of a preference by Rankin of CLAC over the Complainant. Attached is a copy of the March 7, 1991 letter.
- (e) The Complainant filed 54 membership documents in support of its Application for Certification.
- (f) The Respondent Rankin filed schedules with its Reply indicating 74 employees on Schedule "A", 18 employees on Schedule "C" and 6 employees on Schedule "D".
- (g) At the Labour Relations Officer pre-hearing vote meeting held on March 22, 1991, the Complainant insisted that all persons enjoying seniority and recall rights under the incumbent CLAC collective agreement be considered eligible voters. At first, Rankin supported this position granting eligible voter status to all employees at work and/or enjoying seniority recall status. CLAC denied voter eligibility to its members on lay-off who enjoyed seniority recall rights. Attached is a copy of the Pre-Hearing Vote Meeting Report.
- (h) The vote could not be taken until April 9, 1991. By that time, Rankin had reduced the number of employees present at work from 74 to approximately 35. The Respondent Rankin was involved in a large project in connection with the Welland Canal. That project was completed at the end of March. Rankin conducted a massive layoff of employees reducing the number of employees present at work from approximately 74 to approximately 35 prior to voting day April 9, 1991. Further, the Respondent Rankin did not commence construction on other jobs in an effort to avoid retaining employees who had been working on the Welland Canal project.
- (i) At the pre-hearing representation vote held on April 9, 1991, 90 employees cast ballots including employees on layoff. Attached is a copy of the Returning Officer's Report.

- (j) By letter dated April 25, 1991, the Respondent Rankin found it expedient to alter its position to support CLAC and insist on voter eligibility restricted to only employees who were present at work on the terminal date and Voting Day. Attached is a copy of the April 25, 1991 letter.
- (k) By decision dated June 10, 1991, the Board determined that voter eligibility would be established for,

“All employees of the Respondent who are working in the bargaining unit on March 20, 1991 and April 9, 1991...”
- (l) By letter dated August 7, 1991 the Complainant requested that the Board reconsider its decision on voter eligibility. Attached is a copy of the alleged renewal agreement.
- (m) On unknown dates, the Respondents Rankin and CLAC have pursued negotiations to vary terms and conditions of employment culminating in the signing of a renewal agreement expressed to be effective from May 1, 1991 until April 30, 1994 and dated August 16, 1991.
- (n) At no time were *all* employees who enjoyed subsisting seniority rights under the prior CLAC collective agreement contacted to participate in meetings to solicit bargaining proposals.
- (o) At no time was the Complainant consulted with respect to these negotiations nor was its consent given to the negotiations or alterations in terms and conditions, rights and privileges of employment under the previous CLAC collective agreement which are now found in the renewal agreement dated August 16, 1991.
- (p) In granting wage rate increases, the Respondent Rankin has contributed financial and other support to CLAC by altering the operative terms and conditions, rates and privileges inclusive of wage rates. The Respondent Rankin thereby has interfered with the selection of the Complainant as the representative of the employees of Rankin and resulted in coercion, intimidation, threats, promises and undue influence favouring CLAC rather than the Complainant.
- (q) The Respondents Rankin and CLAC while the Complainant continues to be entitled to represent the employees in the bargaining unit by virtue of its initial Application for Certification and Section 81 of the Act, have improperly and unlawfully bargained and/or entered into an alleged collective agreement together binding upon the employees in the bargaining unit.

6. In addition, the letter of March 18 states:

...

- (a) On February 21, 1992 the Complainant filed its second Application for Certification captioned as O.L.R.B. File No. 3731-91-R in connection with the employees of the Respondent Rankin.
- (b) The Terminal Date set for the second Application for Certification captioned as O.L.R.B. File No. 3731-91-R was set for March 3, 1992. Relative to the Application Date, the List of Employees in the bargaining unit filed by the Respondent Rankin consisted of 86 employees, 15 of which were challenged by the Applicant/Complainant Union.
- (c) Relative to the Terminal Date, a Voters List was established consisting of 77 total names, of which 14 were challenged by the Applicant/Complainant Union and three additions were challenged by the Respondent Rankin and CLAC.
- (d) By decision dated March 13, 1992, the Board directed the taking of a pre-hearing rep-

resentation vote with respect to the Second Application for Certification on Thursday, March 19, 1992.

7. Most of the above facts are not in dispute. The respondent and CLAC take issue with the Labourers' characterization of the facts, but to the extent that the particulars set out positions taken or actions taken, these are for the most part documented in correspondence or Labour Relations Officer reports. The respondent and CLAC take issue with paragraph (h) of the Labourers' particulars set out in paragraph 5 above, and CLAC with paragraph (n).

8. Essentially, the facts relied on by the Labourers can be characterized as either those pertaining to the respondent's actions during the first application, and those pertaining to the renewal collective agreement. It should be noted that the position on voter eligibility taken by CLAC during the first application was accepted by the Board in a decision dated June 10, 1991. The Labourers requested reconsideration of that decision, on August 7, 1991 and again in March of 1992. Also in March of 1992, the Labourers wrote to the Board requesting section 8 relief with respect to the first application. The particulars in support of this request are, for the most part, the same as the particulars set out above in paragraphs 5 and 6 of this decision. By decision dated June 11, 1992, the Board ruled that it would not entertain the request for section 8 relief, having regard to the timing of the request. As well, the Board again advised the applicant that there was no basis for the Board to reconsider its earlier rulings on voter eligibility. After disposing of the remaining issues regarding the eligible voters, the Board directed that the ballots be counted. Based on the results of this count, the Board dismissed the application. In this previous decision, the Board also considered submissions by the respondent and CLAC that the Board ought to impose a bar pursuant to section 105(2) of the Act or refuse to entertain the second application. The Board declined to do so.

Submissions of the Parties

9. The relevant sections of the Act are as follows:

49. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purpose of this Act.

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; ...

81.-(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

10. In support of the Labourers' position that the renewal agreement ought to be declared void, counsel for the Labourers' argues that section 81(2) of the Act can and should be read together with the obligation to bargain that is placed on an incumbent bargaining agent and an employer. Counsel does not dispute that as long as CLAC continues to be the bargaining agent, CLAC and the respondent have a duty to bargain in good faith and make every reasonable effort to reach a collective agreement. However, section 81(2) requires that the parties obtain the consent of the Labourers to the terms of the renewal agreement. It is argued that unless such consent

is obtained, the signing of a renewal agreement during the course of a displacement application is a clear demonstration of the employer's preference for CLAC over the Labourers, and negates the appearance of neutrality vis-a-vis the application which section 81 is intended to ensure on the part of an employer. Since the renewal agreement provides for a wage increase, in the absence of concurrence by the Labourers, the weekly pay cheques received by employees are a continuing demonstration of the employer's preference for CLAC. Counsel relies on *Manuel DaSilva Foods Ltd.*, [1984] OLRB Rep. June 834 which, it is stated, sets out an analysis which integrates the duty to bargain under section 15 and the statutory freeze in section 81 in the context of a displacement application. Counsel also relies on *Signal Transformer Co., Inc.* (1982-83) CCH NLRB 26,080.

11. The Labourers also allege that the action of the respondent and CLAC in entering into a renewal agreement is an expression of "other support" within the meaning of section 49 of the Act. As well, it is alleged that in the context of the unfair labour practices committed by the employer, the signing of the renewal agreement must be seen as unlawful in that it is part of an overall attempt to interfere with the employees' freedom of choice with respect to a bargaining agent.

12. Counsel for the respondent submits that the Board ought to refuse to entertain the Labourers' challenges to the validity of the agreement. In his submission, both the allegations with respect to the conduct of the respondent during March of 1991 and the allegations regarding the negotiation of a renewal agreement are untimely. The Board has already rejected them on this basis, in its decision of June 11, 1992. Further, even if the Board considers the allegations, the fact is that the respondent and CLAC acted in accordance with their statutory duties to bargain a collective agreement. Section 81(2) cannot mean that an applicant in a displacement application has the right to join the two parties to the agreement at the bargaining table.

13. Counsel for CLAC submits that no triable issues are raised by the pleadings of the Labourers. It is agreed for the purposes of this argument that CLAC did not consult with the Labourers during the negotiation of the renewal agreement. It is also agreed that this agreement provides for wage increases. Counsel submits that the Board has already interpreted section 81(2), in *Crowle Electric Limited*, [1982] OLRB Rep. Oct. 1458 and has found that the negotiation of a collective agreement during the course of a displacement application does not *per se* violate section 81(2). If this is good law, then the corollary is that there cannot be a requirement under section 81(2) to obtain the consent of the Labourers to the terms of the agreement, because section 81(2) only applies where circumstances constituting a "change" exist. There are good labour relations reasons for adopting the analysis in *Crowle Electrical Limited*, and counsel urges this panel to do so.

Decision of the Board

14. We are satisfied that, even accepting the facts as pleaded by the Labourers to be true, there is no basis for the Board to declare that the collective agreement signed between the respondent and CLAC on August 16, 1991 is void. Dealing first with the Labourers' arguments pursuant to section 81 of the Act, we are satisfied that the facts do not constitute a violation of the statutory freeze. *Crowle Electrical Limited*, *supra*, concerned a very similar situation. In that case, the incumbent union, also CLAC, carried on negotiations with the employer both prior to and after the date of application by the International Brotherhood of Electrical Workers, Local Union 1687. In fact, two weeks after notice of the application was received by the employer, a memorandum of settlement was entered into providing for a substantial increase in wages and benefits. In analyzing the relationship between sections 81[then 79] and 15 of the Act, the Board stated:

...

33. The statute does not provide an easy and ready answer to the question which has been raised. Section 15 of the Act places an obligation on the parties to meet within 15 days of the giving of notice and to bargain in good faith and make every reasonable effort to conclude a collective agreement. Nowhere in the statute is the employer expressly relieved of his duty under section 15 except where an application is made under section 63 [64] of the Act. Section 63(9) [64(9)] of the Act provides:

Where an application is made under this section, an employer is not required, notwithstanding that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

The respondent employer relies on the absence of similar statutory language relieving of the duty to bargain in the face of a displacement application. The employer maintains that in the face of his ongoing duty to bargain he had no choice but to bargain following the giving of notice by the incumbent.

34. Section 79(2) [81(2)] of the Act stipulates that where a union applies for certification, as did the applicant in this case, and the employer has received notice, as had the employer in this case, the employer, except with the consent of the trade union, shall not alter the rates of wages or any other term or condition of employment, or any right, privilege or duty of the employer or employees until the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union. The applicant argues that the prohibition against any alteration in the rates of wages or other terms or conditions of employment is clear and unequivocal, serves a very important industrial relations purpose, and must, therefore, foreclose the negotiation of a collective agreement designed to improve rates of wages and terms and conditions of employment subsequent to the receipt of notice of any application for certification.

35. If the applicant's submissions are accepted, Section 79(2) must be read as qualifying the duty to bargain under section 15 following the employer's receipt of notice of the displacement application. Otherwise an employer who refuses to bargain in the face of a displacement application might find himself faced with a complaint filed by the incumbent union alleging a failure to bargain in good faith. We note as well that under the mandatory provisions of section 16 of the Act the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement where notice to bargain has been given under section 14 or section 53[54]. The appointment of a conciliation officer begins a process, which, if agreement is not reached between the parties, satisfies the preconditions to a lawful strike or lockout. We will have more to say about the practical implications of suspending the duty to bargain in the face of the mandatory provisions for the appointment of a conciliation officer.

15. The Board went on to review some cases before the National Labour Relations Board in the U.S., adopting the approach taken by the N.L.R.B. in *RCA Del Caribe*, [1982] 110 *LRRM* 1369. Ultimately, the Board in *Crowle Electrical Limited* concluded that the "carrying on of negotiations and the implementation of the terms of the resultant collective agreement do not...in and of themselves, constitute a breach of the freeze provisions of the Act or unlawful interference in the protected activities of the applicant trade union". Taking as its starting point the duty to bargain under section 15, the Board states:

• • •

41. Section 63(9) of the Act provides an express exemption from the duty to bargain. In the face of section 63(9) of the Act and in the absence of similar language relieving the employer of the duty to bargain when confronted with a displacement application, we would be hard pressed to read such a limitation into the language of section 79(2). Although section 79(2) prohibits the alteration of rates of wages or any other term or condition of employment, it also preserves any right, privilege or duty of the employer. The duty to bargain is a duty which may rest on an

employer faced with a displacement application for certification and accordingly, it can be argued that the duty to bargain, where it exists, is preserved by the freeze in these circumstances and overrides what would otherwise be a freeze on wages and terms and conditions of employment. This is an interpretation which fits with the Board's "business as usual" approach to section 79 as was enunciated in *Re Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859 as follows:

"It should be emphasized that the 'business as before' approach dictates that the totality of the employment relationship be the subject of the freeze. In interpreting section 70, the Board does not place undue influence upon the term 'rates of wages' but recognizes that this term must be read in the context of the other words in that section. The words 'any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees' must also be given meaning and, in the Board's view, section 70 read as a whole manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety."

42. Furthermore, as we have observed, even if section 79(2) of the Act could be read as somehow suspending the duty to bargain in the face of a displacement application, the right of the incumbent union to seek and obtain the appointment of a conciliation officer continues. The appointment of a conciliation officer starts the process which, in the absence of an agreement by the parties, satisfies the preconditions necessary to a lawful strike or lockout. We cannot accept that the statute was designed to allow the parties to find themselves in a lawful strike or lockout position at a time when the duty to bargain is not in full force and effect. It is inconceivable that the legislature intended a union to find itself in a strike or lockout position at a time when it could not require the employer to bargain in good faith and make every reasonable effort to make a collective agreement. Conversely, it is inconceivable that the legislature intended to allow an employer to find himself faced with a strike for improved terms and conditions of employment at a time when a bargaining response would constitute a violation of section 79(2) of the Act.

43. It is our construction of the statute, in light of the practical labour relations considerations that we have discussed, that the duty to bargain is not in any way modified by the filing of a displacement application for certification. The freeze provisions of section 79(2), which preserve in place any "duty" of the employer, must be read as preserving the duty of the employer to bargain as he would have bargained had there been no displacement application. As the NLRB held in *RCA Del Caribe, Inc. supra*, the competing union must take the incumbent, as the lawfully certified bargaining agent of the employees whose bargaining rights are claimed, as he finds him.

16. The interpretation given to section 81(2) by the Board above is, in our view sensible. Certainly, it seems to make more labour relations sense than allowing a third party union to insert itself at the bargaining table by virtue of having made a certification application.

17. We view *Manuel DaSilva Foods Ltd.*, *supra*, as consistent with our conclusions, and with the approach taken in *Crowle Electrical Limited*. In *Manuel DaSilva*, the Board found that there was no basis under the Act to exempt a displacement application from the freeze provision of section 81(2). Thus, it permitted an applicant union to bring a complaint as to change in working conditions by the employer. The Board did not deal with the content of that "freeze" and whether the conclusion of a renewal collective agreement by an incumbent union and the employer would violate the freeze. We do not find *Signal Transformer Co., Inc.*, *supra*, helpful.

18. We now turn to the Labourers' additional position that the conclusion of the renewal agreement constitutes employer support within the meaning of section 49 of the Act, or constitutes other unlawful interference with the freedom of choice of the employees which should void it. We share the concern expressed by counsel for the respondent as to the timeliness of the allegations with respect to the employer's conduct in March of 1991. As stated above, the Board by its decision of June 11, 1992 refused to consider the Labourers' request in the first application for section

8 relief on the basis of the untimeliness of the request for relief. We have serious doubts as to the wisdom of this panel inquiring into the same particulars in the context of this second application. The facts relied on were known to the applicant at the time they occurred. At the time they occurred, the parties were involved in another proceeding to which these allegations would have been relevant, since they call into question the validity of the pre-hearing vote in the first application as a true representation of employee wishes. Yet, the allegations were made in neither proceeding until almost a year later, in February of 1992. In these circumstances, and in view of the Board's decision of June 11, 1992, we are hard pressed to find any reason why the Board should inquire into these allegations.

19. Even accepting that the applicant can rely on the allegations with respect to the employer's conduct in March of 1991, however, we see no basis for further inquiry. The issue before us is whether there is any basis for voiding the renewal agreement entered into in August of 1991. Even assuming that the *employer* engaged in unfair labour practices five months before the agreement was signed, that it has expressed a preference for CLAC over the Labourers, and that the facts with respect to the negotiations are true, we do not view these as demonstrating employer support within the meaning of section 49 or other unlawful conduct which would lead to a declaration that the agreement is void.

20. The power to declare an agreement void or, using the language of section 49, to find that an agreement "shall be deemed not to be a collective agreement for the purposes of this Act", is an extraordinary one to be applied in narrow circumstances. Section 49(a) speaks to situations of collusion or "sweetheart deals". Implicitly, in our view, the provision is directed as much at actions of a *trade union* as actions of the employer. To the extent that it prohibits collusion, one would expect that the actions complained of involve some element of participation by both the union and the employer.

21. In the case before us, the only actions by CLAC which could even conceivably form the basis of the complaint are a failure to consult with all employees with subsisting seniority rights as to the formulation of bargaining proposals, and the negotiation and conclusion of an agreement which contains wage increases. The only allegation which speaks to actions taken together by CLAC and the employer is that respecting the negotiation of a renewal agreement. We have already stated that we view these negotiations in the context of a statutory duty to bargain. In our view, these are no bases on which to conclude that there has been employer support or other interference with the freedom of choice of the employees in the unit which should void the agreement.

22. We also find it troublesome to the Labourers' case that the negotiations which are complained of took place during a period *after* the holding of a representation vote in the first file, and some six months *prior* to the Labourers' second application. There is no indication that the respondent and CLAC could contemplate that the first application would be dismissed and that the Labourers' would make a second application in February of 1992. Thus, it is difficult to envisage any concrete advantage (in terms of influencing employees in favour of CLAC for the purposes of a subsisting organizing drive) which the alleged collusion was directed to obtain, and we have not been pointed to any.

23. In arriving at our conclusions, we bear in mind some of the comments made by the Board in *Crowle Electrical Limited* in which it recognizes the potential for mischief which exists in a situation where an employer bargains with an incumbent union in the face of a rival union's organizing campaign. We are also not unmindful of the difficulties which an applicant union may have in establishing the facts to support an allegation of collusion even where it exists. In finding that there is no *prima facie* basis on these pleadings to support the violations of the Act that the Lab-

ourers allege, we do not foreclose the possibility that an employer and an incumbent union may be found to engage in unfair labour practices while purporting to rely on their statutory duty to bargain. The facts relied on in this case, in our view, do not establish that.

24. Accordingly, the complaint, insofar as it relies on section 81(2), is dismissed as disclosing no *prima facie* case. We find that there is also no *prima facie* case for the application of section 49(a) or of a violation of any other section relied on by the Labourers in its request to declare the collective agreement between the respondent and CLAC void.

25. Accordingly, the application for certification is dismissed as being untimely. The complaint of unfair labour practice may be relisted for hearing on the remaining issues at the request of any party.

DECISION OF BOARD MEMBER R. R. MONTAGUE: September 3, 1992

1. I dissent.

2. I have great difficulty as to why the employer would want to conclude a collective agreement when not knowing who was going to be the Bargaining Agent for the employees, except as a means of showing the employees the employer's preference.

3. In Crowle Electric Limited, [1982] OLRB Rep. Oct. 1458 at par:

45. In interpreting the statute as we have, we have been troubled by the potential for mischief which exists where an employer bargains with an incumbent union in the face of a rival union's organizing campaign. *We reiterate our observation that many unions and employers voluntarily agree to suspend bargaining pending the outcome of a displacement application.* This decision does not in any way impede the making of such voluntary agreements to suspend bargaining. More importantly however, the employer's duty to bargain is to bargain as he would have bargained in the absence of a displacement application. *If the employer, either on his own, or in conjunction with the incumbent, attempts to seize upon the vehicle of collective bargaining to interfere with employee freedom of choice, he is in violation of the Act. Notwithstanding the ongoing duty to bargain it cannot be used to effect an unlawful purpose and, if it is, the remedial authority of the Board can be brought to bear.* (My emphasis added.)

The only sound conclusion that I am able to reach is that this employer had a preference on whom it wanted to deal with and seized upon the vehicle of collective bargaining to interfere with employees freedom of choice.

Accordingly I would declare that the collective agreement signed between the respondent and CLAC on August 16, 1991 is void and I would allow the application for certification.

COURT PROCEEDINGS

2096-89-OH (Court File No. M8055) Steve Szeghalmi, Applicant v. Ontario Labour Relations Board and **National Plastic Profiles Inc.**, Respondents

Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

Board decision reported at [1990] OLRB Rep. Oct. 1078; Divisional Court decision reported at [1992] OLRB Rep. March 408.

Court of Appeal for Ontario, Robins, McKinlay and Labrosse JJ.A., September 21, 1992.

Robins J.A. (Endorsement): Application for leave to appeal is denied.

CASE LISTINGS AUGUST 1992

	PAGE
1. Applications for Certification	201
2. Applications for First Contract Arbitration	207
3. Applications for Declaration of Related Employer.....	207
4. Sale of a Business	208
5. Applications for Declaration Terminating Bargaining Rights.....	208
6. Applications for Declaration of Unlawful Strike	210
7. Applications for Declaration of Unlawful Lockout.....	210
8. Complaints of Unfair Labour Practice	210
9. Trusteeship	213
10. Jurisdictional Disputes.....	213
11. Applications for Determination of Employee Status.....	214
12. Complaints under the Occupational Health and Safety Act.....	214
13. Colleges Collective Bargaining Act.....	214
14. Construction Industry Grievances	214
15. Applications for Reconsideration of Board's Decision	218

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2208-90-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Alpa Wood Mouldings Company, a division of Alpa Lumber Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Alpa Wood Mouldings Company, a division of Alpa Lumber Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Alpa Wood Mouldings Company, a division of Alpa Lumber Inc., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

3405-91-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Sumrey Holdings Limited c.o.b. as Orangeville I.G.A. (Respondent)

Unit #1: "all employees of Sumrey Holdings Limited c.o.b. as Orangeville I.G.A. in the Town of Orangeville, save and except Store Manager, Assistant Manager, persons above the rank of Assistant Manager, Meat Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit)

Unit #2: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

3664-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Riverside Fabricating Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Riverside Fabricating Limited in the City of Windsor, save and except supervisors/foreman, persons above the rank of supervisor/foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (79 employees in unit) (*Having regard to the agreement of the parties*)

0677-92-R: Christian Labour Association of Canada (Applicant) v. JAV Residences Ltd. c.o.b. as Tranquility Place (Respondent)

Unit: "all employees of JAV Residences Ltd. c.o.b. as Tranquility Place in the City of Brantford, save and except Supervisor, persons above the rank of Supervisor, office and clerical staff, and Hairdresser" (52 employees in unit)

0768-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Bi-Way Stores Limited (Respondent)

Unit: "all employees of Bi-Way Stores Limited in its store at 395 Hespeler Road (store #62) in Cambridge, Ontario, save and except the Assistant Manager, persons above the rank of Assistant Manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods" (20 employees in unit)

0916-92-R: United Steelworkers of America (Applicant) v. Toronto Oxygen Ltd. (Respondent)

Unit: "all employees of Toronto Oxygen Ltd. in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, dispatcher, office and sales staff and students employed during the school vacation period" (4 employees in unit)

0974-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. C.D.C. Contracting, a Division of Patron Contracting Limited (Respondent)

Unit: "all employees of C.D.C. Contracting, A Division of Patron Contracting Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1028-92-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. B.W.A. Foods Inc. c.o.b. as Sandalwood Loeb (Respondent)

Unit: "all employees of B.W.A. Foods Inc. c.o.b. as Sandalwood Loeb in the City of Mississauga employed in the Meat Department, save and except Store Managers, persons above the rank of Store Manager, and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

1033-92-R: International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers Construction Council of Ontario on behalf of International Brotherhood of Electrical Workers Local Union 894 and Local Union 353 (Applicant) v. Schematic Electric, Division of Schematic Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of Schematic Electric, Division of Schematic Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Schematic Electric, Division of Schematic Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1113-92-R: Office and Professional Employees International Union (Applicant) v. Atikokan Crisis Centre Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the Atikokan Crisis Centre Inc. in the District of Rainy River, save and except Supervisors, person above the rank of Supervisor, Administrative Assistant, students employed during the school vacation period and students employed on a co-operative study program" (15 employees in unit) (*Having regard to the agreement of the parties*)

1154-92-R: Retail, Wholesale and Department Store Union (Applicant) v. Weston Bakeries Limited (Respondent)

Unit: "all employees of Weston Bakeries Limited in the City of Sudbury employed for not more than 24 hours per week and students employed during the school vacation period, save and except Foremen and Foreladies, persons above the rank of Foreman and Forelady, office staff, retail store personnel, garage personnel, merchandisers, shippers, route salesmen, route helpers, spare route salesmen, transport drivers and persons employed in any bargaining unit for which any trade union held bargaining rights as of July 15, 1992" (23 employees in unit) (*Having regard to the agreement of the parties*)

1157-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Women's Place (St. Catharines & District) Inc. (Respondent)

Unit: "all employees of Women's Place (St. Catharines & District) Inc. in the City of St. Catharines, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

1172-92-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all security guards employed by Burns International Security Services Limited in the County of Lambton, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

1180-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Teston Pipelines Limited (Respondents)

Unit: "all employees of Teston Pipelines Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged in surveyors, in all sectors in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1181-92-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses Sarnia-Lambton Branch (Respondent)

Unit: "all registered and graduate nurses of Victorian Order of Nurses Sarnia-Lambton Branch employed as Home Care Case Managers in the Home Care Program in the County of Lambton, save and except Assistant Director Homecare and persons above the rank of Assistant Director Homecare" (13 employees in unit) (*Having regard to the agreement of the parties*)

1208-92-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Famz Restaurants (1987) Limited Partnership (Respondent)

Unit: "all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Famz Restaurants (1987) Limited Partnership carrying on business at its Swiss Chalet Restaurant located at 1690 Huron Church Road in the City of Windsor, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager" (38 employees in unit) (*Having regard to the agreement of the parties*)

1218-92-R: Glass, Molders, Pottery, Plastics and Allied Workers International Union (Applicant) v. Polymer Technologies Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Polymer Technologies Inc. in the City of Waterloo, Ontario, save and except Foremen, persons above the rank of Foreman, skilled trades, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

1251-92-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. 656150 Ontario Limited c.o.b. as Swiss Chalet Restaurant (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 656150 Ontario Limited c.o.b. as Swiss Chalet Restaurant in the Town of Newcastle, save and except Assistant Dining Room Manager, and persons above the rank of Assistant Dining Room Manager" (56 employees in unit) (*Having regard to the agreement of the parties*)

1252-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Fermar Paving Limited (Respondent)

Unit: “all employees of Fermar Paving Limited in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1261-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Ault Foods Limited c.o.b. as Blue Crest Food Services (Respondent)

Unit: “all office and technical employees of Ault Foods Limited c.o.b. as Blue Crest Food Services in Hamilton, Ontario, save and except supervisor/department store managers, persons above the rank of supervisor/department store manager, outside sales staff and persons regularly employed for not more than 24 hours per week” (4 employees in unit) (*Having regard to the agreement of the parties*)

1262-92-R: Service Employees Union, Local 183 (Applicant) v. Adult Resource Centre (Quinte) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Adult Resource Centre (Quinte) Inc. in the City of Belleville, save and except Co-ordinator/Managers and persons above the rank of Co-ordinator/Manager and Financial Officer” (9 employees in unit) (*Having regard to the agreement of the parties*)

1280-92-R: Ontario Nurses’ Association (Applicant) v. St. John’s Rehabilitation Hospital (Respondent)

Unit #1: “all lay-registered and lay-graduate nurses employed by St. John’s Rehabilitation Hospital Metropolitan Toronto, save and except unit managers, persons above the rank of unit manager, supervisor-occupational health persons regularly employed for not more than 24 hours per week” (40 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (see Applications for Certification Dismissed without vote)

1308-92-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Marando Bros. Painting Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Marando Bros. Painting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Marando Bros. Painting Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1346-92-R: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all Security Guards in the employ of Meadowvale Security Guard Services Inc. at “Mayfair on the Green”, 400, 410 and 430 McLevin Avenue, in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor and persons regularly employed for not more than 24 hours per week” (6 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3405-91-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Sumrey Holdings Limited c.o.b. as Orangeville I.G.A. (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: “all employees of Sumrey Holdings Limited c.o.b. as Orangeville I.G.A. in the Town of Orangeville

regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Store Manager, Assistant Manager, persons above the rank of Assistant Manager, Meat Manager, office and clerical staff" (19 employees in unit)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	19
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

0389-92-R: International Union United Plant Guard Workers of America Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all security guards in the employ of Burns International Security Services Limited in the Counties of Middlesex, Huron and Oxford, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff, employees employed for more than 24 hours per week and students employed during the school vacation period" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	67
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voter's list	3
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

0807-92-R: Canadian Union of Public Employees (Applicant) v. Victorian Order of Nurses (Respondent)

Unit: "all office and clerical employees of Victorian Order of Nurses in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, Secretary to the Executive Director, Secretary to the Director of Administration and Secretary to the Human Resources Manager" (44 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	36
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	11

Applications for Certification Dismissed Without Vote

3661-91-R: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Bemar Construction (Ontario) Inc. (Respondent) (4 employees in unit)

0705-92-R: Teamsters Local Union No. 419 (Applicant) v. Hamilton Computer Sales and Rentals (Division of the Hamilton Group Limited) (Respondent) (35 employees in unit)

1149-92-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Waterloo (Respondent) v. Waterloo City Hall Staff Association, The Waterloo Supervisory and Maintenance Staff Association (Intervenors) (83 employees in unit)

1280-92-R: Ontario Nurses' Association (Applicant) v. St. John's Rehabilitation Hospital (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all-lay registered and lay-graduate nurses regularly employed for not more than 24 hours per week

by St. John's Rehabilitation Hospital in Metropolitan Toronto, save and except unit managers, persons above the rank of unit manager and supervisor-occupational health" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0336-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Structural Floor Finishing Limited (Respondent) v. Operative Plasterers and Cement Masons' International Association of the United States and Canada Local 598 (Intervener)

Unit #1: "1) all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. 2) all cement masons employed by Structural Floor Finishing Limited in all sectors of the construction industry excluding the ICI." (10 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of ballots segregated and not counted	18

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3956-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. York Spring & Radiator Service Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of York Spring & Radiator Service Ltd. in the Town of Aurora, save and except Manager, persons above the rank of Manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	9

1020-92-R: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all security guards in the employ of Meadowvale Security Guards Services Inc. at "Celebrity Place" namely, 77 Maitland, in the Municipality of Toronto, save and except supervisors and those above the rank of supervisor." (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3

Applications for Certification Withdrawn

0221-92-R: Labourers' International Union of North America, Local 247 (Applicant) v. Grange W. Elliott Limited (Respondent)

0695-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Catalytic Maintenance Inc. (Respondent)

0905-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Bi-Way Stores Limited (Respondent)

0941-92-R: United Food and Commercial Workers International Union (Applicant) v. John Howard Society, Regional Municipality of Waterloo (Respondent)

1024-92-R: Labourers' International Union of North America, Local 527 (Applicant) v. Mike's Union Concrete Ltd. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union 124 (Intervener)

1199-92-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Arcon Electric Ltd. (Respondent)

1209-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. County of Brant R.C.S.S. Board (Respondent)

1297-92-R: Canadian Union of Travel Professionals (Applicant) v. Uniglobe Colonnade Travel Ltd. (Respondent)

1299-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. The Hudson's Bay Company (Respondent) v. Group of Employees (Objectors)

1380-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ruscio Masonry and Construction Limited (Respondent)

1449-92-R: Office and Professional Employees International Union, Local 343 (Applicant) v. McQuesten Legal & Community Services (Respondent)

1452-92-R: Ironworkers District Council of Ontario (Applicant) v. Supercrete Precast Ltd. (Respondent)

1475-92-R: Labourers International Union of North America, Local 607 (Applicant) v. Best - Way Plastering Thunder Bay Ltd. (Respondent)

FIRST AGREEMENT - DIRECTION

0989-92-FC: Office and Professional Employees International Union and its Local 523 (Applicant) v. Levesque Plywood Limited (Respondent) (*Withdrawn*)

1037-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Residential Masonry Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0986-90-R: United Food and Commercial Workers International Union, Locals 175/633 (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited and Sav-A-Centre, A Division of The Great Atlantic & Pacific Company of Canada Limited (Respondents) (*Withdrawn*)

0238-91-R: Canadian Paperworkers Union Local 1150 (Applicant) v. Paperboard Industries Corporation and Specialized Packaging Products Ltd. (Respondents) (*Withdrawn*)

3181-91-R: Schneider Office Employees Association (Applicant) v. J.M. Schneider Inc., Horizon Poultry Products Inc., Schneider Horizon Inc. and J.M. Schneider Poultry Inc. (Respondents) (*Withdrawn*)

3656-91-R: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. 948641 Ontario Limited c.o.b. as J.C. Electrical, Bemar Construction (Ontario) Inc. (Respondents) (*Granted*)

4028-91-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. 537571 Ontario Limited, o/a Sun Steel Company Limited, 958553 Ontario Limited, o/a Phoenix Structural Steel (Respondents) (*Withdrawn*)

0580-92-R; 0581-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Trist Construction Limited and Florack Investments Limited (Respondents); Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trist Construction Limited and Florack Investments Limited (Respondents) (*Withdrawn*)

0799-92-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Banform Construction, 912459 Ontario Inc., and Banforming 1991 Inc. (Respondents) (*Granted*)

0821-92-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Eddy A. Beland c.o.b. as E. Beland Masonry and/or E. Beland Masonry Limited and/or 959640 Ontario Inc. c.o.b. as Beland Masonry (Respondents) (*Granted*)

SALE OF A BUSINESS

0237-91-R: Canadian Paperworkers Union Local 1150 (Applicant) v. Paperboard Industries Corporation and Specialized Packaging Products Ltd. (Respondents) (*Granted*)

3656-91-R: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. 948641 Ontario Limited c.o.b. as J.C. Electrical, Bemar Construction (Ontario) Inc. (Respondents) (*Granted*)

3761-91-R: United Food and Commercial Workers Union, Local 1977 (Applicant) v. LMA Grocery Inc. c.o.b. as Dwyer's Foodland (Respondent) (*Dismissed*)

4027-91-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. 537571 Ontario Limited, o/a Sun Steel Company Limited and 958553 Ontario Limited, o/a Phoenix Structural Steel (Respondents) (*Granted*)

4030-91-R: Canadian Union of Public Employees, Local 1281 (Applicant) v. Canadian Union of Educational Workers and Association of Part-Time Professors of the University of Ottawa (Respondents) (*Granted*)

0580-92-R; 0581-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Trist Construction Limited and Florack Investments Limited (Respondents); Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trist Construction Limited and Florack Investments Limited (Respondents) (*Withdrawn*)

0800-92-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Banform Construction, 912459 Ontario Inc., and Banforming 1991 Inc. (Respondents) (*Granted*)

0821-92-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Eddy A. Beland c.o.b. as E. Beland Masonry and/or E. Beland Masonry Limited and/or 959640 Ontario Inc. c.o.b. as Beland Masonry (Respondents) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2256-91-R: Stephen Stacey and Frank King (Applicant) v. The Canadian Paperworkers Union and its Local 934 (Respondent) v. Domtar Inc. (Intervener)

Unit: "all employees of the Company in its Plant situated at St. Marys, Ontario, save and except Foremen,

and those above the rank of Foreman, Office Personnel, Sales Staff, watchmen and guards, and employees engaged in confidential capacity relating to labour relations.” (111 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	133
Number of persons who cast ballots	109
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	109
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	95

3127-91-R: Marcel Girard (Applicant) v. Brewery, Malt & Soft Drink Workers, Local 304 (Respondent) v. Fortier Beverages (Intervener) (25 employees in unit) (*Granted*)

0334-92-R: Donald Feener (Applicant) v. Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562 (Respondent) v. Walden Roofing & Sheet Metal Co. Limited (Intervener)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Walden Roofing & Sheet Metal Co. Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working Foremen and persons above the rank of non-working Foreman” (3 employees in unit) (*Dismissed*)

0351-92-R: Barry Hampel on his own behalf and on behalf of a group of employees of Kool Temp Ltd. (Applicant) v. Sheet Metal Workers International Association and Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562 (Respondent) v. Kool Temp Ltd. (Intervener) (*Withdrawn*)

0786-92-R: Frank Pezzano (Applicant) v. United Steelworkers of America (Respondent) v. Accuflex Industrial Hose Ltd. (Intervener)

Unit: “all employees of Accuflex Industrial Hose Ltd. in the City of Guelph, save and except Supervisors, those above the rank of Supervisor, sales, office and clerical staff and students employed during the school vacation period” (48 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	21
Number of ballots marked against respondent	24

0952-92-R: Harc Incorporated (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

1049-92-R: Laura Beaupre-(Hurley), Diane Foubert, Khaled Nasr (Applicant) v. Independent Canadian Transit Union Local 6 (Respondent) v. Confederation Realty (Intervener) (3 employees in unit) (*Granted*)

1278-92-R: Mary C. Russell (Applicant) v. Service Employees Union, Local 183 (Respondent) v. Sisters of St. Joseph of the Diocese of Peterborough (Intervener) (*Withdrawn*)

1385-92-R: Kenneth A. Cline (Applicant) v. IWA Canada - Local 2693 (Respondent) v. Wire Rope Industries Ltd. (Intervener) (2 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1224-89-U: Gravel and Lake Services Limited (Applicant) v. Roland Frayne, Neils Husman, Larry Duhaime (Respondents) (*Withdrawn*)

1225-89-U: Gravel And Lake Services Limited (Applicant) v. International Woodworkers of America - Canada Local 2693 (Respondent) (*Withdrawn*)

2034-89-U: Gravel and Lake Services Limited (Applicant) v. International Woodworkers of America - Canada Local 2693, et al. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1332-92-U: Christian Labour Association of Canada (Applicant) v. Orillia Steel Works Inc. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1213-89-U: Prosper Brizzard, Richard Brizzard, Robert Casson, Richard Koski, David Jaggard, Manfred Krause, Robert Krause, David Ross, Aulus Tiitto, Darrel Westover, Raynard Jacobson, Bruce Nordstrom, Larry Jaggard (Complainants) v. Wilf McIntyre, Fred Miron, Roland Frayne, Niels Husman, Larry Duhaime and International Woodworkers of America - Canada, Local 2693, (Respondents) (*Withdrawn*)

0840-90-U: United Steelworkers of America (Complainant) v. Placer Dome Inc. (Respondent) (*Withdrawn*)

0987-90-U: United Food & Commercial Workers International Union, Locals 175/633 (Complainant) v. The Great Atlantic & Pacific Company of Canada Limited, Sav-A-Centre, a division of the Great Atlantic & Pacific Company of Canada Limited, and The Retail, Wholesale and Department Store Union, Local 414 (Respondents) (*Withdrawn*)

2999-90-U: United Steelworkers of America (Complainant) v. Minnova Inc. (Respondent) (*Withdrawn*)

3180-90-U: Teamsters Local Union 230 (Complainant) v. Esso Petroleum Canada a division of Imperial Oil Ltd. (Respondent) (*Dismissed*)

3301-90-U: Lawrence E. Leblanc (Complainant) v. B. Carrozzi, Business Manager/Secretary Treasurer, and all other Executive Board Members - Local 527 Labourer's International Union of North America (Respondents) (*Dismissed*)

0190-91-U: Erik Hansink (Complainant) v. General Motors of Canada Oshawa Truck Plant Management (Respondent) (*Withdrawn*)

0239-91-U: Canadian Paperworkers Union, Local 1150 (Complainant) v. Paperboard Industries Corporation and Specialized Packaging Products Ltd. (Respondent) (*Withdrawn*)

2929-91-U: Eugene Deseire Solomon (Complainant) v. Retail, Wholesale & Department Store Union (Respondent) (*Dismissed*)

3374-91-U: Antonia Leben (Complainant) v. St. Joseph's Health Centre and Local 1144 CUPE Union (Respondents) (*Withdrawn*)

3472-91-U: James N. Krall (Complainant) v. United Brotherhood of Carpenters and Joiners of America Local 785 (Respondent) (*Dismissed*)

3600-91-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Dualux Enterprises Inc. (Respondent) (*Withdrawn*)

3960-91-U; 0073-92-U: Association of Allied Health Professionals: Ontario (Complainant) v. Peterborough Civic Hospital (Respondent) (*Withdrawn*)

0031-92-U: George Catenacci (Complainant) v. Ron Gunn, Vince Virgillio and Amalgamated Transit Union, Local 113, Ian Lane and Toronto Transit Commission (Respondents) (*Dismissed*)

0141-92-U: Paul Formosa (Complainant) v. General Motors of Canada (Respondent) (*Withdrawn*)

0166-92-U: Eric Williams (Complainant) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) v. Ellis Don Limited (Intervener) (*Dismissed*)

0234-92-U: Energy & Chemical Workers' Union (Complainant) v. Sandoz Canada Inc. (Respondent) (*Dismissed*)

0235-92-U; 0255-92-U: Office and Professional Employee's Union, Local 225 (Complainant) v. Maison Baldwin House (Respondent) (*Withdrawn*)

0283-92-U: Lance Ryan (Complainant) v. United Steelworkers of America, Local 9038 (Respondent) v. Electro Sonic Inc. (Intervener) (*Withdrawn*)

0327-92-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Complainant) v. Conpour Services Ltd., Erosion Control Gabions Ltd., Hollingworth Construction Co. and Lindsay Brothers Construction (Respondents) (*Granted*)

0390-92-U: Wayne J.P. Desbiens (Complainant) v. Executive Members of Union Local 1165, Canadian Union of Public Employees Rep., Nipissing Board of Education (Respondent) (*Withdrawn*)

0391-92-U: Wayne J.P. Desbiens (Complainant) v. The Nipissing Board of Education, Canadian Union of Public Employees Executive Board of Local 1165 (Respondent) (*Withdrawn*)

0392-92-U: Wayne J.P. Desbiens (Complainant) v. C.U.P.E. Local 1165 Executives & Employee's of the Union Membership (Respondent) (*Withdrawn*)

0420-92-U: The International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Consolidated Canadian Contractors Inc. (Respondent) (*Withdrawn*)

0492-92-U: United Steelworkers of America (Complainant) v. ESM Metallurgical Products Inc. (Respondent) (*Withdrawn*)

0541-92-U: Albert Drapeau (Complainant) v. Canadian Paperworkers Union - Local 90 (Respondent) (*Dismissed*)

0767-92-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Bi-Way Stores Limited (Respondent) (*Withdrawn*)

0826-92-U: George Piliarik (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Respondent) v. Environs Services (Lambton) Inc. (Intervener) (*Dismissed*)

0912-92-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Murphy's Potato Chips Inc. (Respondent) (*Withdrawn*)

0938-92-U; 0977-92-U: Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. Rexdale Mobile Truck Wash Inc. (Respondent) (*Withdrawn*)

0971-92-U: Sheet Metal Workers' International Association, Local 30 (Complainant) v. Ideal Food Service Equipment (Respondent) (*Withdrawn*)

0980-92-U: Robert J. Sebrosky (Complainant) v. Fortinos Supermarkets Limited (Respondent) (*Withdrawn*)

1047-92-U: International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers Construction Council of Ontario on behalf of International Brotherhood of Electrical Workers Local Union 894 and Local Union 353 (Applicants) v. Schematic Electric and John Plainos (Respondents) (*Withdrawn*)

1091-92-U: Jason Garden and Phil O'Connor (Complainants) v. United Electrical Workers, Local 549 (Respondent) (*Withdrawn*)

1099-92-U: Dale Jannack (Complainant) v. United Food & Commercial Workers Union Local 459 (Respondent) (*Withdrawn*)

1130-92-U: United Steelworkers of America (Complainant) v. Dan Courville Chevrolet Geo Oldsmobile Ltd. (Respondent) (*Withdrawn*)

1174-92-U: International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers Construction Council of Ontario on behalf of International Brotherhood of Electrical Workers Local Union 894 and Local Union 353 (Applicants) v. Schematic Electric and John Plainos (Respondents) (*Withdrawn*)

1177-92-U: Bi-Way Stores Limited (Complainant) v. United Food and Commercial Workers Union, Local 175 (Respondent) (*Withdrawn*)

1192-92-U: Judy Bell (Judith Anne M. Bell) (Complainant) v. Service Employees International Union, Local 532 and Grace Villa Nursing Home (Respondents) (*Withdrawn*)

1202-92-U: Barry Donald Craib (Complainant) v. Canadian Union of Public Employees Local 504, The Corporation of the City of Peterborough (Respondents) (*Withdrawn*)

1226-92-U: Kraken Electric Ltd. (Complainant) v. Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Respondent) (*Granted*)

1230-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondents) (*Withdrawn*)

1235-92-U: Mary Rutherford (Complainant) v. Jerry Clifford (Respondent) (*Withdrawn*)

1265-92-U: Sunnybrook Maintenance Printing Department (Represented by James Cooke) (Complainant) v. Service Employees International Union Local 777 (Respondent) (*Withdrawn*)

1276-92-U: The Hamilton Branch of Langs Cold Storage (Complainant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) Local 525 and Allen M. McGlinchey (Respondents) (*Withdrawn*)

1277-92-U: Joao Oliveira Soares (Complainant) v. Mississauga Hydro (Respondent) (*Dismissed*)

1302-92-U: Canadian Paperworkers Union, Local 322 (Complainant) v. Carleton Cards Limited (Respondent) (*Withdrawn*)

1307-92-U: Ray Major (Complainant) v. The American Federation of Grain Millers, Local 242 (Respondent) (*Withdrawn*)

1311-92-U: Antonio Marques Da Silva (Complainant) v. Durable Equipment 1984 Ltd. (Respondent) (*Dismissed*)

1331-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Dart Machine Limited (Respondent) (*Withdrawn*)

1372-92-U: Pauline Martin (Complainant) v. Cliff Jewell, President, C.U.P.E. Local 1627 and C.U.P.E. Local 1627 (Respondents) (*Withdrawn*)

1383-92-U: Justin Mosca (Complainant) v. Caterair Chateau Canada Limited (Respondent) (*Withdrawn*)

1481-92-U: Christian Labour Association of Canada (Complainant) v. Orillia Steel Works Inc. and Don Hill (Respondents) (*Withdrawn*)

1486-92-U: V. Gaynor (Complainant) v. Westin Harbour Castle Toronto (Respondent) (*Dismissed*)

1556-92-U: Deny Kuoch (Complainant) v. General Foam & Cushion (Respondent) (*Dismissed*)

TRUSTEESHIP

0499-92-T: Re: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) and International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union 834, Toronto, Ontario (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2189-88-JD: Labourers' International Union of North America, Local 183 (Complainant) v. Armbro Materials and Construction Limited, United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Respondents) (*Granted*)

0970-90-JD: Ironworkers District Council of Ontario, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Ironworkers) (Complainants) v. Acco Canadian Material Handling Group, a Division of Babcock Industries Canada Inc. (Acco); Allied Conveyors Limited; Adam Clark Limited; Comstock Canada, a Division of Lundrigans-Comstock Limited; Nicholls-Radtke & Associates Ltd. (Nicholls-Radtke); State Contractors Inc.; Millwrights District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, Local 1592 (Respondents) v. Association of Millwrighting Contractors of Ontario (Millwrights) (Intervener) (*Dismissed*)

1038-90-JD: International Association of Bridge, Structural and Ornamental Ironworkers, International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Complainants) v. Electrical Power Systems Construction Association, Ontario Hydro, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States And Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Respondents) (*Granted*)

1316-91-JD; 1317-91-JD: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 30 (Complainants) v. Electrical Power Systems Association, Canadian Engineering and Contracting Co. Limited, Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Respondents); Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers' International Association, Local 537 (Complainants) v. The Electrical Power Systems Construction Association, Canadian Engineering and Contracting Co. Limited, United Brotherhood of Carpenters', Local 18 (Respondents) (*Withdrawn*)

0217-92-JD: International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Complainant) v. Nicholls-Radtke Ltd., Insulcana Contracting Ltd., Sheet Metal Workers' International Association, Local 397 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3010-89-M: Ontario Public Service Employees Union, Local 559 (Applicant) v. Centennial College (Respondent) (*Dismissed*)

1319-90-M: Southern Ontario Newspaper Guild Local 87 (Applicant) v. Harlequin Enterprises Limited (Metroland Printing, Publishing and Distributing Division) (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2687-90-OH: Eric Dagenais (Complainant) v. PCL Constructors Eastern Inc. (Respondent) (*Granted*)

0342-92-OH: Bruce Smyth (Complainant) v. Toronto Transit Commission (Respondent) (*Dismissed*)

0592-92-OH: Glen Rastall (Complainant) v. Fluid Pack International Limited (Respondent) (*Withdrawn*)

1008-92-OH: Ibolya Martin and Laszlo Szabo (Complainant) v. Metropolitan Toronto Condominium Corporation #1018, King's Gate Developments Inc., United Lands Management, United Lands Corporation Limited (Respondents) (*Granted*)

1111-92-OH: National Automobile and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 27 and Tim Coles (Complainants) v. Diesel Division, General Motors of Canada Limited (Respondent) (*Withdrawn*)

1300-92-OH: United Brotherhood of Carpenters and Joiners of America - Local 1072 and Rupert Phinn (Complainants) v. Ontario Store Fixtures Inc (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

3010-89-M: Ontario Public Service Employees Union, Local 559 (Complainant) v. Centennial College (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2232-88-G: United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Applicant) v. The Foundation Company of Canada Limited (Respondent) (*Granted*)

2932-89-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Company Limited (Respondent) (*Granted*)

2657-90-G: Canron Inc. (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers Local 786, International Association of Bridge, Structural and Ornamental Ironworkers and Ironworkers District Council of Ontario, Stephen Carpenter, Daniel Girard (Respondents) (*Dismissed*)

0207-91-G; 0208-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Trist Construction Co. Ltd. (Respondent); Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trist Construction Co. Ltd. (Respondent) (*Withdrawn*)

0410-91-G; 0411-91-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Canadian Engineering & Contracting Co. Limited, Electrical Power Systems Construction Association (Respondents); Sheet Metal Workers' International Association, Local 30 (Applicant) v. Canadian Engineering & Contracting Co. Limited, Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

1075-91-G: Labourers International Union of North America, Ontario Provincial District Council and Lab-

ourers International Union of North America, Local 837 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

3439-91-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. 537571 Ontario Limited, o/a Sun Steel Co. Limited, 958553 Ontario Limited, o/a Phoenix Structural Steel (Respondents) (*Granted*)

3545-91-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. California Concrete (Respondent) (*Granted*)

3646-91-G: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. J.C. Electrical, Division of 948641 Ontario Limited (Respondent) (*Granted*)

3798-91-G: Ontario Allied Construction Trades Council, Labourers' International Union of North America and Labourers' International Union of North America, Local 506 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

3905-91-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)

3911-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Lomar Mechanical Corp. Ltd. (Respondent) (*Withdrawn*)

0123-92-G; 0124-92-G; 3830-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. Ltd. (Respondent) (*Withdrawn*)

0136-92-G; 0461-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Mastercraft Development Corporation (Respondent); United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Zone 1) (Applicant) v. Mastercraft Development Corporation (Respondent) (*Granted*)

0183-92-G: International Brotherhood of Painters and Allied Trades Local (Applicant) v. Kite Painting Company Ltd. (Respondent) (*Withdrawn*)

0318-92-G: International Brotherhood of Electrical Workers Local 353 (Applicant) v. E. S. Fox Limited (Respondent) (*Withdrawn*)

0642-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. MCY Construction Limited (Respondent) (*Withdrawn*)

0663-92-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Opec Acoustics & Drywall Ltd. (Respondent) (*Withdrawn*)

0728-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

0868-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Vachon Electrical - Mechanical Limited (Respondent) (*Withdrawn*)

0880-92-G: Labourers' International Union of North America, Local 506 (Applicant) v. Nelson Concrete Cutting (Respondent) (*Granted*)

0949-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

1081-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Switchway Electric Co. Ltd. (Respondent) (*Granted*)

1096-92-G; 1389-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pit-On Construction Company Limited (Respondent) (*Granted*)

1110-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Buchanan Floor Coverings Ltd. (Respondent) (*Withdrawn*)

1116-92-G: Labourers' International Union of North America, Local 607 (Applicant) v. George Stone & Sons Division of 612354 Ontario Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (*Withdrawn*)

1204-92-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

1210-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northern Structures Ltd. (Respondent) (*Withdrawn*)

1211-92-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. IPCF Construction (Respondent) (*Withdrawn*)

1221-92-G: Iron Workers' District Council of Ontario and International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Mathews Conveyor Company of Canada Limited (Respondent) (*Granted*)

1246-92-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Baron Insulations Limited (Respondent) (*Withdrawn*)

1256-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

1268-92-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Brennan Paving & Construction Ltd. (Respondent) (*Withdrawn*)

1283-92-G: Sheet Metal Workers International Association, Local 504 (Applicant) v. Richards Mechanical Services Ltd. (Respondent) (*Withdrawn*)

1321-92-G: Drywall, Acoustic Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Consolidated Drywall & Acoustics Limited (Respondent) (*Granted*)

1322-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Smith Bros. Excavating (Windsor) Ltd. (Respondent) (*Granted*)

1329-92-G: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Rideau Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

1330-92-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. Mike's Union Concrete Ltd. (Respondent) (*Withdrawn*)

1345-92-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Mavi Drywall Systems Ltd. (Respondent) (*Granted*)

1347-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Conform (Ontario) Inc. (Respondent) (*Granted*)

1348-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J. Patterson Construction Ltd. (Respondent) (*Withdrawn*)

1349-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Conformco Inc. (Respondent) (*Withdrawn*)

1350-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Baxcan (Respondent) (*Withdrawn*)

1351-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. S.N.T. General Contractors Ltd. (Respondent) (*Withdrawn*)

1369-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ro-Von Construction Limited (Respondent) (*Withdrawn*)

1378-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Buttcon Limited (Respondent) (*Withdrawn*)

1396-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. John W. Baldwin Electric Company Limited (Respondent) (*Withdrawn*)

1397-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Hergert Electric Ltd. (Respondent) (*Withdrawn*)

1398-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. MacNaughton Electric Company Limited (Respondent) (*Withdrawn*)

1400-92-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Triple- A Electric Limited (Respondent) (*Withdrawn*)

1407-92-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Daybue Contracting Ltd. (Respondent) (*Withdrawn*)

1408-92-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Siding I.P.E. Ltd. (Respondent) (*Withdrawn*)

1409-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Murphy Construction (Div. of 833833 Ontario Limited) (Respondent) (*Withdrawn*)

1410-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. A.S.P. Access Floors Inc. (Respondent) (*Withdrawn*)

1412-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Choctaw Construction Co. Ltd. (Respondent) (*Withdrawn*)

1416-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Barclay Construction (Respondent) (*Withdrawn*)

1417-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Dulepka Equipment Rentals Ltd. (Respondent) (*Withdrawn*)

1418-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Regal Forming Ltd. (Respondent) (*Granted*)

1419-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Delsan Demolition (Respondent) (*Withdrawn*)

1421-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. A. Canadian Stebbins Engineering & Manufacturing Company (Respondent) (*Withdrawn*)

1424-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. A. Braga Masonry (Respondent) (*Withdrawn*)

1426-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. A. Capital Cutting and Coring Ltd. (Respondent) (*Withdrawn*)

1429-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Environmental Abatement (Respondent) (*Withdrawn*)

1430-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Premiere Cable Construction (Respondent) (*Withdrawn*)

1437-92-G: International Union of Elevator Constructors (Applicant) v. Canadian Escalator and Elevator Service Company Limited (Respondent) (*Withdrawn*)

1440-92-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Ledo Drywall Ltd. (Respondent) (*Withdrawn*)

1445-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. J.C. Sulphur Construction Ltd. (Respondent) (*Granted*)

1464-92-G: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Construction Ltd. (Respondent) (*Granted*)

1465-92-G: Labourers' International Union of North America, Local 493 (Applicant) v. Kona Builders Limited (Respondent) (*Granted*)

1484-92-G: Labourers' International Union of North America, Local 1089 (Applicant) v. C.W.A. Contracting Limited (Respondent) (*Granted*)

1515-92-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Norm Brandon Limited (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0173-91-U: Peter Galiatsos (Complainant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Respondent) v. Famous Players Inc. (Intervener) (*Dismissed*)

1207-91-U: Mario Aristodemo (Complainant) v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union (Respondent) v. Heritage Clothing (Canada) Ltd. (Intervener) (*Dismissed*)

1812-91-OH: Roger Kennedy (Complainant) v. Whitler Industries Limited (Respondent) (*Dismissed*)

2656-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Admiral Drywall Ltd. (Respondent) (*Dismissed*)

2662-91-U: Margaret Alexander (Complainant) v. Esselte Pendaflex Canada Inc., Graphic Communications International Union, Local 466 (Respondents) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

867 6 1993



3 1761 11468007 7